A

DAMANSARA REALTY (PAHANG) SDN BHD v. OM CAHAYA MINERAL ASIA BHD & ANOTHER APPEAL

COURT OF APPEAL, PUTRAJAYA
AB KARIM AB JALIL JCA
S NANTHA BALAN JCA
B SUPANG LIAN JCA
[CIVIL APPEALS NO: W-02(NCvC)(W)-2289-11-2018 &
W-02(IM)(NCvC)-685-04-2019]
3 DECEMBER 2020

C ***CONTRACT:*** *Termination – Agreement – Right to terminate agreement by giving 60 days' notice – Letter of termination demanded plaintiff to 'cease operations and demobilise immediately' – Plaintiff kept out of land immediately upon termination – Non-compliance with notice period – Whether termination simpliciter or termination with cause – Whether time given to remedy breach – Whether* D *defendant relinquished right to raise any reason to justify termination – Whether termination lawful*

The plaintiff and the defendant ventured into an agreement whereby the plaintiff was to cut, clear, fill and level the defendant's land and thereafter, extract minerals (bauxite) from the said land. The plaintiff claimed that it had E completed site clearance and the cut and fill works on the land as well as other related works pursuant to the agreement. However, by a letter dated 11 September 2015 ('termination letter'), the defendant abruptly and without any warning whatsoever terminated the agreement and also did not give any reasons for the termination. According to the plaintiff, they tried to salvage F the situation and made various appeals to the defendant. However, the defendant refused to let the plaintiff remain on the land and the plaintiff was prevented from performing their obligations under the agreement. Hence, the plaintiff filed Suit 140 seeking various reliefs, including a declaration that the agreement was wrongfully terminated, special damages for 'wasted G expenditure', damages for loss of profit and alternatively, for specific performance of the agreement. The defendant, *vide* encl. 10, sought to strike out Suit 140 under O. 18 r. 19(1)(a), (b), (c) and (d) of the Rules of Court 2012 ('ROC') on the grounds that the agreement was tainted with illegality as the plaintiff did not have the requisite licences to operate on the land and that the agreement was in contravention of both the Federal and the State H laws related to mining. The High Court, in allowing encl. 10 and striking out Suit 140, held that the agreement was tainted with illegality as the plaintiff would not be able to lawfully perform and honour its undertaking under the agreement as they did not have the requisite mining licences. The plaintiff appealed to the Court of Appeal. The Court of Appeal allowed the plaintiff's I appeal and reinstated Suit 140, holding that there were various issues of and

concerning the issue of the alleged illegality which had to be investigated at a full trial and it was not a plain and obvious case to be struck out. The case was then fixed for full trial and thereafter, the High Court ruled in favour of the plaintiff and concluded that the defendant had wrongfully terminated the agreement. Pertaining to the assessment of damages, the judge ruled in favour of the plaintiff and awarded RM10.8 million with interest and costs. Hence, the two appeals by the defendant against the finding on liability ('Appeal 2289') and against the award of damages ('Appeal 685').

Held (allowing Appeal 685 and dismissing Appeal 2289)
Per S Nantha Balan JCA delivering the judgment of the court:

(1) Any termination of a contract will almost inevitably result in financial, reputational, legal and other consequences on the party whose contract is being terminated. Under cl. 5.1 of the agreement, the defendant had the contractual right to terminate the agreement by giving 60 days' notice of termination without ascribing any reasons, *ie*, termination *simpliciter*. However, the letter of termination demanded that the plaintiff should 'cease operations and demobilise immediately'. The defendant opted to use this route of termination, *ie*, termination *simpliciter* (without cause) rather than termination for cause *via* cl. 5.1(a). Thus, it was a termination with a notice period of 60 days. By not relying on any reason for the termination, the defendant had relinquished or abandoned the right to raise any reason/cause to justify the termination. (paras 125-130)

(2) Despite giving the 60 days' notice, the termination was, for all intents and purposes, a termination which was forthwith or immediate. Therefore, it was necessary that the termination must be for cause and that means the reason(s) for the termination or the breach that was purportedly committed by the plaintiff, must be brought to their attention and they must be given the period of 14 days to remedy the breach (if any). However, during the 60 days period, the plaintiff was not allowed into the land and were prevented from carrying out their obligations under the agreement. If it was termination for cause, the termination clause was not complied with. Hence, the notice of termination was bad because the defendant did not refer to any purported breaches by the plaintiff in accordance with cl. 5.1 of the agreement and did not give them 14 days to remedy any alleged breach. Therefore, the termination of the agreement was unlawful. (paras 135-138)

(3) The bauxite mining that was envisaged under the agreement was in respect of subterranean deposits of bauxite and not the bauxite deposits in the topsoil. Under s. 81 of the Mining Enactment 2001 of Pahang, it was the owner of the alienated land, the defendant, who had to procure the licence. In this case, the defendant did not apply for a licence and neither did the plaintiff. As a third party, the plaintiff could not apply for the requisite licence without a power of attorney. The defendant ought to have made it possible for the plaintiff to have procured such a licence for the second stage of the works to be undertaken under the agreement. The first part of the works under the agreement had been completed by the plaintiff. Therefore, the defendant could not rely on illegality to justify the termination of the agreement. In the circumstances, there was no merit in Appeal 2289 and the appeal was accordingly dismissed. (paras 142, 143 & 147-149)

(4) Special damages must be specifically pleaded and particularised and strictly proven. The plaintiff sought RM10.8 million as an alternative to their original claim for wasted expenditure but had not proven that they were entitled to the RM10.8 million as per the letter of award. Hence, the judge should not have entertained the submission for RM10.8 million and ought to have confined to the claim that was allowed *ie*, para. 29 of the statement of claim ('SOC'). Paragraph 29 of the SOC was a claim for special damages which must be specifically pleaded and strictly proven. Plainly, there was no evidence to prove the items of wasted expenditure as per para. 29 of the SOC and therefore, should have been dismissed. (paras 155, 156 & 159-161)

(5) The plaintiff relied on Part C of the documents at the assessment of damages and these were not proven as per the Evidence Act 1950 and neither were these admitted as exhibits. In the result, there was no evidence to support the claim for damages under the heading of 'wasted expenditure'. Further, the provision of omnibus prayer under para. 35(7) of the SOC could not be called in aid in the peculiar and specific circumstances of the case as the judge had unequivocally and specifically confined the plaintiff's claim for damages to para. 29 of the SOC, which was sought as a relief per para. 35(2) of the SOC – wasted expenditure. The judge expressly disallowed para. 35(3) and (4) of the SOC and the plaintiff did not appeal or cross-appeal against that ruling. In the result, Appeal 685 was allowed and the order of the High Court dated 29 March 2019 (on damages) was set aside. (paras 165, 167-169)

Case(s) referred to:

Abu Bakar Pangis & Ors v. Tung Cheong Sawmill Sdn Bhd & Ors And Another Appeal [2015] 5 CLJ 753 CA ***(refd)***

Anderson, Limited v. Daniel [1924] 1 KB 138 ***(refd)***

Antara Vista Sdn Bhd v. Rumaya Properties Sdn Bhd [2017] 1 LNS 1876 CA ***(refd)***

Australian Broadcasting Commission v. Australasian Performing Right Assn Ltd [1973] HCA 36 ***(refd)***

Catajaya Sdn Bhd v. Shoppoint Sdn Bhd And Ors [2021] 3 CLJ 159 FC ***(refd)***

Forest Steel Sdn Bhd v. Iconic Gateway Sdn Bhd & Anor And Another Appeal [2020] 7 CLJ 19 CA ***(refd)***

Hill v. Baxter [1958] 1 QB 277 ***(refd)***

llkiw v. Samuels [1963] 2 All ER 879 ***(refd)***

KTL Sdn Bhd & Anor v. Leong Oow Lai & Other Cases [2014] 1 LNS 427 HC ***(refd)***

Lee Chye Yen & Anor v. EoneNet.Com Sdn Bhd [2013] 1 LNS 1241 CA ***(refd)***

Lori Malaysia Bhd v. Arab-Malaysian Finance Bhd [1999] 2 CLJ 997 FC ***(refd)***

Macvilla Sdn Bhd v. Mervyn Peter Guan Yin Hui & Anor [2019] 1 LNS 949 CA ***(refd)***

Menaka v. Lum Kum Chum [1976] 1 LNS 181 PC ***(refd)***

Om Cahaya Mineral Asia Bhd v. Damansara Realty (Pahang) Sdn Bhd [2016] 1 LNS 826 HC ***(refd)***

Om Cahaya Mineral Asia Bhd v. Damansara Realty (Pahang) Sdn Bhd [2018] 5 CLJ 587 CA ***(refd)***

Ong Ah Long v. Dr S Underwood [1983] 2 CLJ 198; [1983] CLJ (Rep) 300 FC ***(refd)***

PP v. Datuk Hj Harun Hj ldris & Ors [1977] 1 LNS 92 HC ***(refd)***

R v. Gillespie [1967] 51 Cr App Rep 172 ***(refd)***

R v. Moghal [1977] Crim LR 373 ***(refd)***

R v. Plumer [1814] R & R 264 ***(refd)***

UEM Group Bhd v. Genisys Integrated Engineers Pte Ltd & Anor [2010] 9 CLJ 785 FC ***(refd)***

Voo Nyuk Fah & Anor v. Lam Yat Kheong & Anor [2012] 5 CLJ 229 CA ***(refd)***

Legislation referred to:

Contracts Act 1950, ss. 66, 74(1)
Evidence Act 1950, ss. 32, 73A
Mineral Enactment 2001, ss. 2, 34, 35, 81(1), 153, 154, 157, 158, 160
National Land Code, s. 5
Rules of Court 2012, O. 18 r. 19(1)(a), (b), (c), (d)

Indian Contract Act 1872 [Ind], s. 65

Other source(s) referred to:

Edwin Peel, *Treitel's The Law Of Contract*, 14th edn, paras 18-036

For the appellant - Mathew Thomas Philip, Alliff Benjamin Suhaimi & Phoebe Loi Yean Wei; M/s Thomas Philip

For the respondent - Masturina Mohamad Rodzi; M/s Edwin Lim & Suren

[Editor's note: For the High Court judgment, please see Om Cahaya Mineral Asia Berhad v. Damansara Realty (Pahang) Sdn Bhd [2016] 1 LNS 826 (overruled in part).]

Reported by S Barathi

A

JUDGMENT

S Nantha Balan JCA:

Introduction

B **[1]** There are two appeals before us, *viz*, Civil Appeal No. W-02(NCvC)(W)-2289-11/2018 ("Appeal 2289") and Civil Appeal No. W-02(1M)(NCvC)-685-04/2019 ("Appeal 685"). The appeals arise out of decisions that were given by the learned judge ("the judge") in Kuala Lumpur High Court Suit No. WA-22NCvC-140-03/2016 ("Suit 140") after a full trial.

C **[2]** The appellant in both appeals is Damansara Realty (Pahang) Sdn Bhd. They were the defendant in Suit 140. The plaintiff in Suit 140 was Om Cahaya Mineral Asia Berhad. For convenience, the parties shall be referred to according to their respective capacities in the High Court. Hence, the appellant in both appeals shall be referred to as "the defendant", and the respondent as "the plaintiff".

D **[3]** The trial of Suit 140 was bifurcated into the liability phase and assessment of damages phase. The appeals before us are directed at the judge's decisions on liability and damages.

[4] The defendant was the owner of the land which was the subject of an E agreement with the plaintiff. Under the agreement, the plaintiff was to cut, clear, fill and level the defendant's land. Thereafter, the plaintiff was to extract minerals (bauxite) from the said land.

[5] According to the plaintiff, they had done all the necessary preparatory works and that the land was ready for mining operations to commence. F However, the plaintiff could not proceed with the performance of their contractual obligations under the agreement because the defendant had issued a termination letter dated 11 September 2015.

[6] After the termination letter was issued, the plaintiff initially took a supplicatory stand and appeared to acquiesce to the defendant's right to G terminate the agreement. They sought the defendant's indulgence and asked that they be allowed to continue with the performance of their obligations under the agreement. (see: plaintiff's letter dated 14 September 2015).

[7] Ultimately, the plaintiff took the robust position that the defendant's letter of termination was a manifestation of a wrongful termination of H contract. In Suit 140, the plaintiff sought various reliefs, including a declaration that the agreement was wrongfully terminated, special damages (RM15,833,484.16 – for "wasted expenditure"), damages for loss of profit (USD85 million or RM366,656,000). Alternatively, the plaintiff sought specific performance of the agreement.

I

[8] The plaintiff filed Suit 140 on the basis that the defendant had wrongfully terminated the agreement.

[9] On 19 October 2018, the judge delivered her decision on liability and held that the defendant had wrongfully terminated the agreement. Appeal 2289 is directed at the decision of the judge dated 19 October 2018 in regard to the judge's finding on liability.

[10] After deciding on liability, the judge undertook an assessment of damages. The judge's decision on damages was delivered on 29 March 2019. The plaintiff was awarded RM10.8 million as damages. Appeal 685 is the defendant's appeal against the award of damages in the sum of RM10.8 million.

[11] On 3 December 2020, we dismissed Appeal 2289 and affirmed the decision of the High Court dated 19 October 2018 on liability. We allowed Appeal 685. Consequently, we set aside the High Court's decision dated 29 March 2019. We made no order as to costs for both appeals. This judgment explains why we dismissed Appeal 2289 and allowed Appeal 685.

Background

[12] The plaintiff's business includes, *inter alia*, preparing and clearing sites for construction works. They undertake cut and fill work, plus site clearance and mineral extraction. They are also involved in the exportation of minerals.

[13] The defendant is the registered owner of a parcel of land known as Lots 1, 2, 3, 4, 9, 12 and 18 located at Mukim Sungai Karang, Daerah Kuantan, Pahang Darul Makmur measuring approximately 500 acres ("the land").

[14] The relevant local authority (planning authority) having jurisdiction over the land is the Majlis Perbandaran Kuantan ("MPK").

[15] The relevant department which has jurisdiction for the issuance of permits and licences for mining and minerals and/or its extraction etc, is the Pejabat Ketua Pengarah Pentadbir Tanah dan Galian, Pahang ("PTG").

[16] The plaintiff and the defendant ventured into an agreement whereby the plaintiff was to do site clearance and undertake proper cut and fill works for the purpose of mining operations over the land. The underlying agreement between the defendant and the plaintiff is predicated on the following documents which shall be referred to collectively, as "the agreement":

(i) the agreement dated 1 December 2014;

(ii) letter of intent dated 3 December 2014;

A (iii) letter of award dated 5 February 2015;

(iv) the variation letter dated 2 March 2015; and

(v) letter of intent dated 5 June 2015.

B **[17]** The plaintiff's position is that the agreement created a two-fold obligation on its part. According to the plaintiff, they had to first undertake site clearance, perform cut and fill works over the land, and thereafter level the land. The second part of the obligation was to pay a lump sum fee of RM30.8 million, as tribute payment for the rights granted under the agreement to extract and dispose of the minerals found on the land.

C **Termination**

[18] The plaintiff claimed that it had completed site clearance and the cut and fill works on the land as well as other related works pursuant to the agreement. However, by a letter dated 11 September 2015 ("the termination D letter"), the defendant abruptly and without any warning whatsoever terminated the agreement. The defendant gave no reasons whatsoever for the termination.

[19] The termination letter reads as follows:

E 11th September 2015

OM CAHAYA MINERAL ASIA BERHAD
Suite 8.01, Level 8, Menara Binjai,
No. 2, Jalan Binjai
50450,
Kuala Lumpur

F Attn: Puan Sofia Aziz

Dear Madam,

AGREEMENT DATED 1st DECEMBER 2014 FOR PREPARATION OF SITE FOR FUTURE DEVELOPMENT ON LOT 18, LOT 12 AND G PORTION OF LOT 9, MUKIM SUNGAI KARANG, DAERAH KUANTAN, NEGERI PAHANG DARUL MAKMUR MEASURING APPROXIMATELY 200 ACRES AND LETTER AFFECTING VARIATION TO THE AGREEMENT (DATED 1st DECEMBER 2014) DATED 2ND MARCH 2015

H - TERMINATION OF THE AGREEMENT DATED 1st DECEMBER 2014 AND LETTER OF VARIATION DATED 2ND MARCH 2015

Reference is made to the agreement dated 1st December 2014 (hereinafter referred to as "the agreement" and the Letter of Variation dated 2nd March 2015 (hereinafter referred to as "the Variation Letter") with regards to the above matter.

I

Pursuant to Clause 5 of the agreement and the Variation Letter, the Company hereby gives you a sixty (60) days written notice of termination of the agreement and the Variation Letter from the date of this letter.

Pursuant to this notice of termination, you shall immediately cease to carry out any works on the premise (Lots 12, 18 and portion of Lot 9, Mukim Sungai Karang, Daerah Kuantan, Pahang Darul Makmur) and to demobilise all of your equipment and to surrender any related documents to the company including, but not limited to all reports and findings in relation to any mineral extraction exercise and/or studies immediately as provided by Clause 5 of the agreement.

This notice and termination herein do not prejudice to our rights and remedies against you under the laws and equity.

Thank you.

Yours sincerely,

For and On Behalf of
DAMANSARA REALTY (PAHANG) SDN BHD

HJ MOHD FAZLIN SHAH BIN MOHD SALLEH
Group Chief Executive Officer

c.c. EXECUTIVE VICE CHAIRMAN DAMANSARA REALTY BERHAD

[20] According to the plaintiff, they tried to salvage the situation and made various appeals to the defendant. However, the defendant refused to let the plaintiff to remain on the land. As such, the plaintiff was prevented from performing their obligations under the agreement. The plaintiff was unsuccessful in their attempt at getting the defendant to change their mind on the termination of the agreement.

[21] Suit 140 was filed on 5 February 2016.

[22] The defendant filed their defence on 15 March 2016.

Striking out

[23] On 14 Apri12016, the defendant filed an application (*via* encl. 10) to strike out Suit 140 under O. 18 r. 19(1)(a), (b), (c) and (d) of the Rules of Court 2012 ("ROC"). Enclosure 10 was predicated on the grounds that the agreement was tainted with illegality as the plaintiff did not have the requisite licences to operate on the land and that the agreement was in contravention of both the Federal and the State law related to mining.

[24] The High Court agreed with the defendant. Enclosure 10 was allowed. On 27 May 2016, Suit 140 was struck out. (see: *Om Cahaya Mineral Asia Berhad v. Damansara Realty (Pahang) Sdn Bhd* [2016] 1 LNS 826; [2016] MLJU 893; [2016] MLRHU 607 HC). The High Court held that the

agreement was tainted with illegality as the plaintiff would not be able to lawfully perform and honour its undertaking under the agreement as they did not have the requisite mining licences.

[25] The plaintiff appealed to the Court of Appeal. The Court of Appeal allowed the plaintiff's appeal and reinstated Suit 140. According to the Court of Appeal, there were various issues of and concerning the issue of the alleged illegality which had to be investigated at a full trial and it was not a plain and obvious case to be struck out. The Court of Appeal's judgment is reported as *Om Cahaya Mineral Asia Bhd v. Damansara Realty (Pahang) Sdn Bhd* [2018] 5 CLJ 587; [2019] 1 MLJ 683; [2018] 4 MLRA 376 CA.

[26] The case was then fixed for full trial. On 19 October 2018, the High Court ruled in favour of the plaintiff and concluded that the defendant had wrongfully terminated the agreement. The defendant appealed to the Court of Appeal (Appeal 2289). The second stage was the assessment of damages. On 29 March 2019, the judge ruled in favour of the plaintiff and awarded RM10.8 million with interest and costs. The defendant appealed to the Court of Appeal (Appeal 685).

The Pleadings

[27] The plaintiff's pleaded case per the statement of claim dated 5 February 2019 ("SOC") is as follows:

> Statement of Claim
>
> 25. Without the Plaintiff's knowledge and after the Land was cleared by the Plaintiff, the Defendant conducted a 2-D Electrical Resistivity Imaging Survey analysis over the land. The 2-D Electrical Resistivity Imaging Survey Report dated 5.9.2014 confirms the Plaintiff's Geologist' report (which was communicated to the Defendant earlier) that the Land contains elements of bauxite fit for mining and export.
>
> UNLAWFUL TERMINATION BY THE DEFENDANT
>
> 26. Not even a week after the 2-D Electrical Resistivity Imaging Survey Report dated 5.9.2014 was issued, the Defendant immediately terminated the agreement between the Plaintiff and the Defendant. By a letter dated 11.9.2015 from the Defendant to the Plaintiff ("the termination letter"), the Defendant terminated the agreement dated 1.12.2014 and the variation letter dated 2.3.2015 and refused any longer to be bound by it. No reason whatsoever was given the termination letter to justify the Defendant's termination of the agreement. The Plaintiff will refer to the termination letter for its full terms, meaning and effect as may be necessary.
>
> 27. Further or in the alternative, notwithstanding the Plaintiff's appeal and request to remain on site *vide* the Plaintiff's letters dated 14.9.2015 and 11.11.2015 to perform its obligation under the agreement, the Defendant has wrongfully and in breach of the agreement failed, refused and prevented the Plaintiff from entering the site.

28. By a letter dated 12.11.2015 from the Defendant to the Plaintiff, the Defendant refused the Plaintiff to remain on site and instructed the Plaintiff to demobilise all its machineries and equipment from the site within 7 days from the date of the letter, and thereby the Defendant prevented the Plaintiff from completing the works under the agreement.

29. *By reason of the foregoing, the Plaintiff has suffered loss for works which has already been carried out pursuant to the agreement, lost the benefit of the agreement and lost the revenue and profit they would have otherwise have received under it and have thereby suffered loss and damage.*

(emphasis added)

PARTICULARS OF WASTED EXPENDITURE

No.	Works done	Costs (RM)
1.	Site clearance works, engaging contractors and machineries for the purpose of the works	6,418,148.97
2.	Mobilisation fees for machineries	400,000.00
3.	Surveyor fees	20,560.00
4.	ldling costs	4,538,000.00
5.	Geologist fees	107,672.78
6.	Laboratory Expenses	69,036.41
7.	Lodging	44,544.00
8.	Vehicle rental pursuant to the agreement	25,550.00
9.	Stamp duty	32,350.00
10.	Financial Consultant Fees 90,000.00	
11.	Overhead expenses	2,000,000.00
12.	Payment of Tribute	2,000,000.00
13.	Miscellaneous	87,622.00
	TOTAL	RM15,833,484.16

The Reliefs

[28] The reliefs sought per para. 35 of the SOC were as follows:

(i) a declaration that the termination of the agreement *via* the defendant's letter dated 11 September 2015 was invalid an unlawful;

(ii) special damages (wasted expenditure) in the sum of RM15,833,484.16;

(iii) loss of profit in the sum of USD85 million (RM366,656,000 as at the date of this summons);

(iv) alternatively, or *in lieu*;

(a) a declaration that specific performance be granted to the plaintiff to proceed with the said agreement;

A (b) an order that the plaintiff be granted an extension of time of 526 days with an option to extend for a further one year (from the expiry date of the agreement), from the date of this order to complete the works under the agreement;

B (iii) loss and expenses arising from the delay caused by the wrongful termination by the defendant to be assessed by the court from the date of wrongful termination on 11 September 2015 until the date of this order;

(v) interest and finance charges to be assessed by the court from the date of wrongful termination on 11 September 2015 until the date of this order;

C (vi) costs;

(vii) further and other relief as is deemed necessary by this Honorable Court.

Defence

D **[29]** In the defence, the defendant sought to justify the termination, broadly on the basis that:

> [21] (b) Walaupun diberikan peringatan berulang-kali, Plaintif telah gagal melaksanakan obligasi-obligasinya kepada Defendan, *inter alia*, seperti berikut;
>
> E (i) Gagal memperolehi lesen yang diperlukan bagi menjalankan perlombongan bijih bauksit di tapak Defendan sepertimana yang diperlukan dibawah klausa 3(a) Perjanjian tersebut;
>
> (ii) Gagal membekalkan Defendan dengan laporan kemajuan kerja bulanan sepertimana termaktub dibawah klausa 3(g) Perjanjian
> F tersebut;
>
> (iii) Gagal membuat bayaran-bayaran kepada Defendan pada waktu-waktu yang ditetapkan seperti diatas;
>
> (iv) Oleh yang demikian, Defendan telah menamatkan Perjanjian tersebut dengan memberikan Plaintif notis sebanyak enam puluh
> G (60) hari akan penamatan tersebut;
>
> (v) Walaupun Plaintif sepatutnya keluar dari tapak Defendan pada atau sebelum 11.11.2015, namun Defendan telah memberikan kelonggaran kepada Plaintif untuk berada di tapak Defendan tersebut sehingga 19.11.2015. Akan tetapi, sehingga sekurang-
> H kurangnya tarikh 25.11.2015, Plaintif masih belum mengeluarkan jenteranya dari tapak Defendan.

High Court – Grounds Of Judgment

[30] We may turn now to the judge's grounds of judgment ("GOJ"). The
I relevant parts of the GOJ read as follows:

7. (A). GROUNDS OF JUDGEMENT

(IN RESPECT OF LIABILITY)

7.1 Pursuant to Recital C of the parties' agreement, both Plaintiff and Defendant have agreed for Plaintiff to carry out works namely site clearance, cut and fill works and, extraction of mineral ores.

7.2 Defendant's Letter of Award dated 5/2/2015 to the plaintiff was accepted by the plaintiff for works to be carried out on the demarcated portion of the land stated in parties' agreement. The defendant's Letter of Award detailed out rate of payment for plaintiff's works namely RM4000 per acre x 200 acres, which totaled RM800,000. The second part of the plaintiff's work under the agreement i.e cut and fill works, was to be paid RM50,000 per acre x 200 acres, totaling RM10 Million.

7.4 Based on the clear unequivocal provisions of the agreement, it is undisputed that defendant was legally obligated to pay plaintiff the sum of RM10.8 Million as was agreed by the plaintiff and defendant for the first part of the works under the agreement.

7.5 As prayed in plaintiff's paragraph 13 to 22 of plaintiff's Statement of Claim, plaintiff clearly have completed and fulfilled its obligation to the defendant under the agreement, in the plaintiff's clearance of the land, stripping of the top soil and removal of overburden on the land.

7.6 plaintiff's case of complete fulfillment of its contractual obligation *vide* the agreement, is supported by the testimony in court of plaintiff's director PW2, and defendant's former Managing Director, PW3. It was also supported by photos of the state of the land prior and after the plaintiff's works.

7.7 No cross examination of PW2 was made by defendant's counsel on the detailed photographs which disclosed defendant's leveled and cleared land pursuant to the plaintiff's execution of the contract works. PW3 confirmed plaintiff's cutting of the palm oil trees and, clearance of the defendant's land during his tenure as defendant's Managing Director.

7.8 defendant's termination of plaintiff's agreement *vide* its letter dated 11/9/2015, in all its entirety, is found to be unsubstantiated and, without basis. The termination contravened Clause 5 of the parties' agreement dated 1/12/2014, and was evidently motivated by greed. Defendant had clearly benefited financially from the premature and unilateral termination of parties' agreement in the defendant's cleared and leveled and, filled land.

7.9 Pursuant to a revision in the period for the notice of termination from 30 days under Clause 5.1 of the agreement to 60 days under the defendant's letter dated 2/3/2015 either party may terminate unilaterally (the agreement) which would become effective after 60 days from its issuance.

7.10 The agreement may be terminated by the defendant upon the occurrence of event under paragraph 5(a) to (c) of the agreement. Thus defendant's termination letter dated 11/9/2015 entitled "Termination of the agreement dated 1/12/2014 and Letter of Variation dated 2/3/2015".

A 7.11 Defendant's termination letter directed the plaintiff to cease from carrying out works on the premise; to demobilise all equipment and surrender all related documents to the defendant. However defendant's aforesaid termination letter, contained glaring consistency between paragraph (2) and (3) of the letter which stated as follows:

B [2] Pursuant to Clause 5 of the agreement and the Variation Letter, the company hereby gives 60 days Notice of Termination of the agreement and the Variation Letter from the date of this letter.

[3] Pursuant to this Notice of Termination, you shall immediately cease to carry out any works on the premise and to demobilise all
C of your equipment and to surrender any related documents to the company.

7.12 It is evident from both provisions that, are contradictory as to the mode of termination paragraph 3 of the termination letter, directed the plaintiff to stopped [*sic*] all works on defendant's land with immediate
D effect without any notice of termination being issued by the defendant upon the expiry of the 60 days period. Plaintiff was further stopped from entering the site following defendant's issuance of the 11/9/2015 termination.

7.13 Further, the defendant's prohibition on plaintiff's entry on the site
E was even made prior to the defendant's issuance of termination letter to plaintiff. The court thus is in agreement [*sic*] with the plaintiff's submission of defendant's wrongful premature termination of the agreement, made forthwith without complying the 60 days notice provided under Clause 5.1 of parties' agreement and paragraph 2 of the defendant's Variation Letter dated 2/3/2015. The termination was unilaterally made by the defendant
F without observing or complying the occurrence of events provided in Clause 5.1(a), (b) and (c) of the agreement.

[31] We now turn to the judge's basis for awarding damages in the sum of RM10.8 million. The judge's reasons may be gathered from the following paragraphs of the GOJ under the heading, "assessment of special damages":

G 7.1 In respect of defendant's appeal against **court's assessment of special damages of RM10.8 Million payable by the defendant to the plaintiff the following are the court's brief grounds**:

(1) The sum of RM10.8 Million was prayed by the plaintiff as damages for the works carried out by the plaintiff for the first part of the
H agreement. Plaintiff have pursuant to its contractual obligation fully performed the first part of the works under the agreement namely the site clearance and, cut and fill works on the defendant's land.

(2) At the material time of defendant's wrongful termination, plaintiff have completed carrying out the contractual works and, have
I incurred enormous expenses totaling RM25,055,048.32 as was confirmed by PW2's testimony in court. PW2 gave detailed evidence of wasted expenses and particularised such expenses in Appendix A of plaintiff's written submission.

(3) Thus based on the supporting documentary evidence adduced in court, namely cash vouchers, invoices, receipts for accommodation of plaintiff's employees and consultant, vehicle rentals, stamp duties, financial advisors consultant fees, overhead costs and, sub-contractor payment were supported by documentary evidence adduced before this court. Thus, the sum of RM10.8 Million as special damages was allowed by the court.

(4) Accordingly, the court allowed against the defendant's assessment of plaintiffs special damages for the sum of RM10.8 million for works done and completed by the plaintiff.

Conclusion

8. 1 For the reasons elaborated above, the court thus allowed plaintiff's prayers for special damages in paragraph 35(1) and (2) pursuant to paragraph 29 of plaintiff's Statement of Claim with cost of RM20,000/- subject to 4% allocator fee and interest at 5% from the date of judgment. The court further allowed for the assessment of special damages for the sum of RM10.8 million for works done and completed by the plaintiff on the defendant's land. Paragraph 35(3) and (4) of plaintiff's Statement of Claim is disallowed.

(emphasis added)

The Defendant's Submissions

[32] The defendant attacked the judge's finding on liability principally on the basis that they were entitled to and did lawfully terminate the agreement. The defendant also contended that the judge erred in failing to appreciate that there was a clear and unequivocal contractual provision which gave the defendant the right to terminate the agreement by giving 60 days' notice to the plaintiff.

[33] The defendant placed particular emphasis on the tone and content of the plaintiff's letter dated 14 September 2015, wherein the plaintiff expressly or implicitly acknowledged that the termination was fully within the defendant's prerogative.

[34] In that letter, the plaintiff expressed surprise that the agreement was being terminated. The plaintiff also noted that the defendant had not furnished any reasons for the termination. Then the plaintiff went on to state in that letter as follows:

However, we note that it may be the prerogative decision of the management of DRP to issue the termination letter for reasons better known to DRP itself. Nonetheless, would like to appeal against the termination and we humbly seek your kind consideration, to allow OCMAB to continue with the works on site for reasons stated below as follows ...

[35] The defendant also emphasised that prior to the letter of demand that was issued by the plaintiff's solicitors on 20 January 2016, there was no dispute regarding the termination of the agreement. The defendant contended that the plaintiff and its subcontractors remained on the land until September 2017 which was beyond the 60 days' contractual notice period. This however, was disputed by the plaintiff.

[36] In so far as the issue of illegality is concerned, it was contended that the site clearance works which had been performed by the plaintiff, were illegal. It was contended that the plaintiff failed to obtain the requisite licence, permits and/or approvals for these works and as such, there was a breach and/or violation of:

(i) clause 3(a) of the agreement;

(ii) Mineral Enactment 2001 of Pahang ("the Mining Enactment"); and

(iii) The Mineral Development Act 1994.

[37] As such, it was contended that the plaintiff's failure to obtain the licences amounts to an illegality *vis-a-vis* the performance of the works under the agreement. (Ref: *Anderson, Limited v. Daniel* [1924] 1 KB 138). According to the defendant, the works which had been performed by the plaintiff are "mining works".

[38] Counsel referred us to the following definitions in relation to mining which are found in s. 2 of the Mining Enactment:

> Section 2 Interpretation
>
> "mine rehabilitation plan" means a rehabilitation plan approved under section 126;
>
> "mineral" means any substance whether in solid, liquid or gaseous form occurring:
>
> (a) naturally;
>
> (b) as a result of mining in or on the earth; or
>
> (c) as a result of mining in or under the sea or sea bed,
>
> formed by or subject to a geological process but excludes water, "rock material" as defined in the National Land Code and "petroleum" as defined in the Petroleum Mining Act 1966 [Act 95];
>
> "mineral ore" means any mineral of economic interest from which one or more valuable constituents may profitably be recovered by treatment;
>
> "mineral tenement" means a fossicking licence, dulang licence, individual mining licence, prospecting licence, exploration licence, mining lease, proprietary mining licence, or any of them for the purpose of exploration or mining of minerals or mineral ores, as the case may be;

"mining land" means land in respect of which a mining lease or proprietary mining licence is for the time being in force;

"mining lease" means a mining lease granted under section 63 and a mining lease granted or issued under any previous written law relating to mining;

"mining operation" means the aggregate of all mines, including waste and tailing dumps, operating or planned in relation to mining land;

"to mine" means intentionally to win minerals and includes any operation directly or indirectly and necessary therefor or incidental thereto, and "mining" shall be construed accordingly;

"to pan" means to wash or sift with a pan, dulang or rake for the purpose of obtaining minerals;

"treat" means to subject to any process whereby chemical or physical change takes place in the substance subjected thereto;

"waste" includes any discarded overburden material, tailing, any intermediate product from mining or mineral processing stockpiled for further operations, water treated or stored in mining or mineral processing, and any chemical substance temporarily or permanently withdrawn from such operations;

[39] Counsel for the defendant also referred to the evidence of Encik Muhamad lkram bin Jalil ("DW4"), who was an officer from the PTG. DW4 confirmed that the works which the plaintiff claimed had been carried out, were in fact mining works. DW4 said that even preparatory mining works, as pleaded by the plaintiff in the SOC, required mining permits and/or licence under the Mining Enactment.

[40] Counsel for the defendant took the position that it was mandatory for the plaintiff to have a mining licence/permit in order to perform the works and that their failure to obtain such permits, renders the same unlawful. In this regard, counsel also referred to ss. 153, 154, 157, 158 and 160 of the Mining Enactment and Part 3 of the Mineral Development Act 1994 ("MDA").

[41] Reference was also made to the case of *Forest Steel Sdn Bhd v. Iconic Gateway Sdn Bhd & Anor And Another Appeal* [2020] 7 CLJ 19; [2020] MLJU 563; [2020] AMEJ 0341 CA at para. 50 where it was held:

[50] It therefore makes commercial sense that Forest Steel must first carry out the mining operation pursuant to the LA for the BSPC to take effect. To commence mining operation, there must be in place 6 valid PMLs approved by the State Authority and issued by the PTG pursuant to section 81 of the Mining Enactment. Section 158 of the Mining Enactment makes it an offence for any person to conduct mining without a valid licence whether or not any mineral is won and imposes penalty on conviction.

[42] The relevant sections of the Mining Enactment that were relied upon by the defendant are as follows:

81. Application for proprietary mining licence

(1) An application for a proprietary mining licence shall be made by the owner of any alienated land to the State Authority in the prescribed form.

(2) No proprietary mining licence shall be granted in respect of any area within a prospecting or exploration area in respect of which a prospecting licence or exploration licence has been granted except with the written consent of such licence holder.

(3) An application for a proprietary mining licence shall include a pre-feasibility study which shall include:

(a) a general description of the proposed mining scheme;

(b) the expected commencement date of mineral production (to be stated as the number of months from the date the proprietary mining licence is issued);

(c) a schedule of estimated annual raw ore production for the term of the proprietary mining licence; and

(d) such other information as may be prescribed or requested by the Committee.

(4) Upon receipt of an application under subsection (1), the State Authority shall refer the application to the Committee for its recommendation.

(5) In considering an application for a proprietary mining licence for the purpose of making its recommendation, the Committee shall verify that the applicant:

(a) has complied with the requirements of this Enactment; and

(b) is technically and financially qualified to develop and mine the area to which the application relates.

(6) The Committee shall, as soon as practicable after considering the application, transmit to the State Authority its report and recommendation whether the application should be:

(a) approved, in whole or in part:

(i) confirming that the applicant has complied with the requirements of this Enactment; and

(ii) specifying the terms or conditions subject to which the licence is to be granted; or

(b) refused.

(7) On receipt of the report and recommendation by the Committee under subsection (6), the State Authority may, subject to subsection (9), approve or refuse the application whether or not the Committee recommends the approval of the application or the refusal thereof and its decision shall be final.

(8) The State Authority shall notify:

(a) the applicant;

(b) the Committee; and

(c) the Director,

in writing of its decision under subsection (7).

(9) The State Authority shall, subject to this Enactment, grant the proprietary mining licence if:

(a) the applicant is also the holder of a prospecting licence or exploration licence, as the case may be, covering such land; and

(b) the Committee has recommended that the application be approved.

(10) If the application for a proprietary mining licence is approved the Director shall, as soon as practicable after being notified under paragraph (8)(c), and upon payment of the prescribed fee, register the instrument of proprietary mining licence and issue to the applicant a proprietary mining licence in Form G as set out in Schedule I subject to such terms or conditions as may be specified therein or as may be prescribed.

(11) If the applicant fails to pay the prescribed fee for a proprietary mining licence within sixty days after being notified of its approval, such approval shall be deemed revoked.

(12) Upon the registration of a proprietary mining licence in the register of proprietary mining licences:

(a) the Director shall record or cause to be recorded an entry of such registration in the register wherein the title to the land licensed to be mined is recorded; and

(b) the Registrar or the Land Administrator, as the case may be, shall inform the Director of any entry, note or memorial made or cancelled in the register document of title in respect of which the proprietary mining licence has been issued and the Director shall, upon being so informed, make such necessary changes in the licence.

(13) The rights and obligations of a proprietary mining licence shall, while such licence continues in force, attach to and be inseparable from the registered title to the land so licensed to be mined.

(14) A proprietary mining licence shall not be transferable or charged or dealt with otherwise than by means of and incidental to a transfer or charge of, or other dealing with, the title to the land licensed to be mined:

Provided that every transfer or charge of, or other dealing with, the said title shall extend to and include the mining rights conferred by such licence.

153 Minerals unlawfully obtained

Any person who wins minerals by fossicking, panning, exploration or mining without a licence or lease issued or granted under this Enactment shall be guilty of an offence and shall, on conviction, in addition to any other fine or term of imprisonment imposed under this Chapter, be ordered to pay to the State Authority:

(a) a sum not exceeding five times the royalty payable in respect of any minerals unlawfully taken; and

(b) a sum not exceeding three times the value of such minerals,

and any sum ordered to be paid shall be recoverable as a debt due to the State Authority.

154 Penalty for fossicking without licence

Subject to this Enactment, any person who fossicks without a valid licence issued under this Enactment shall be guilty of an offence and shall, on conviction, be liable to a fine not exceeding five thousand ringgit or to imprisonment for a term not exceeding six months or to both.

157 Penalty for conducting exploration without licence

(1) Any person who conducts any exploration:

(a) without a valid prospecting licence or exploration licence issued under this Enactment; and

(b) in the case of alienated land, occupied land, reserved land or reserved forest area, without the written permission of the owner of the alienated land or occupied land, or the officer for the time being having the control over the reserved land or reserved forest area, or authorisation under an access order as provided under section 88 or 91,

shall be guilty of an offence.

(2) For the purpose of subsection (1), "exploration" shall not include fossicking.

158 Penalty for mining without a valid licence or lease

Any person who conducts mining without a valid licence or lease issued under this Enactment whether or not any mineral is won shall be guilty of an offence and shall, on conviction, be liable to a fine not exceeding five hundred thousand ringgit or to imprisonment for a term not exceeding ten years or to both.

160 Unlawful removal from mining land

Except as otherwise authorised under any other written law, any person who removes beyond the boundaries of the mining land for any purpose-

(a) any timber or other forest produce;

(b) any plant, vegetable, animal, poultry or fish; or

(c) any coral, earth, gravel, guano, loam, rock, sand, shell, clay, brick, lime, cement or other commodity manufactured from such materials, obtained from or on the mining land,

shall be guilty of an offence and shall, on conviction, be liable to a fine not exceeding fifty thousand ringgit or to imprisonment for a term not exceeding three years or to both, and be ordered to pay to the State Authority the value of the thing removed and any sum ordered to be so paid shall be recoverable as if it were a fine so imposed.

[43] According to counsel for the defendant, the judge completely disregarded the unchallenged evidence of DW4 and the statutory provisions under the Mining Enactment. Counsel said that the defendant was entitled to terminate the agreement due to the plaintiff's breach of cl. 3(a) which was described as an essential term of the agreement. The plaintiff did not make any application for permits or any requests to the defendant to assist in such applications. It was contended that there was no basis for the High Court to hold that the plaintiff could obtain a licence/permit even after the agreement had been entered into.

[44] According to counsel for the defendant, the judge also failed to take into account s. 81 of the Mining Enactment which allows a person who is not a landowner to apply for a proprietary mining licence. Counsel said that the plaintiff could have applied for the licence.

[45] In so far as the issue of "motive" is concerned, it was argued that there was no basis for the judge to hold that the defendant's termination was motivated by greed due to the more lucrative agreement with YHS Resources Sdn Bhd ("YHS"). Counsel said that there is no evidence to support the same. It was pointed out that the plaintiff relied on an undated agreement between the defendant and YHS which is a Part C document, and which was never admitted as evidence.

[46] Counsel said that contrary to the plaintiff's contention, the agreement is not divided into two parts, ie, site clearance and cut and fill works as the first part, and the extraction of mineral as the second part.

[47] In this regard, counsel referred to Recitals B and C of the agreement which made it clear and unequivocal that the works mentioned therein are considered as a single scope of work. This is also consistent with the following documents:

(i) item 1 of the letter of intent dated 3 December 2014 which placed mining works together with other works and thereby showing a single scope of works;

A (ii) item 3 of the letter of award which showed that the parties had envisaged a single scope or part for the agreement;

(iii) the plaintiff's letter dated 6 March 2015 appointing Healthcare Technical Services Sdn Bhd ("HTS") as a subcontractor which provided for one single scope of works; and

B

(iv) the plaintiff's letter dated 14 April 2015 which mentioned the letter of offer dated 6 March 2015 in relation to the mining of bauxite works.

[48] Counsel referred to the Court of Appeal's decision in *Antara Vista Sdn Bhd v. Rumaya Properties Sdn Bhd* [2017] 1 LNS 1876; [2017] MLJU 1964; C [2017] MLJU 2247; [2019] 7 AMR 229; [2017] AMEJ 2013 CA at para. 19 where it was held that the interpretation of an agreement, the court shall not go beyond the four corners of the terms in relation to the works agreed by the parties.

[49] Counsel also referred to the case of *Australian Broadcasting Commission* D *v. Australasian Performing Right Assn Ltd* [1973] HCA 36 at para. 7, which held the court cannot simply insert any additional obligations or any alternative interpretation.

[50] Counsel for the defendant also submitted that the judge was wrong to E rely on the plaintiff's evidence and/or documents which are self-serving to show it had purportedly completed the "first part" of the works.

[51] In support, counsel referred to the decision of the Court of Appeal in *Abu Bakar Pangis & Ors v. Tung Cheong Sawmill Sdn Bhd & Ors And Another Appeal* [2015] 5 CLJ 753; [2014] 5 MLJ 384; [2014] 6 MLRA 1 CA at para. F [30], which held that self-serving evidence should be given little or no weight unless supported by some other credible corroborative evidence.

[52] In this regard, it was contended that the evidence from the plaintiff's witnesses, namely, Supiah binti Aziz (PW2) and A'zmin bin Abdullah (PW3) are self-serving and are uncorroborated. Counsel said that the G testimonies of the plaintiff's witnesses in relation to the completion of the works were never corroborated. The judge erred in accepting photographs adduced by the plaintiff as proof of work done despite the fact that these were never admitted as evidence and remained as Part C documents.

[53] Next, it was contended that the plaintiff never provided any monthly H progress reports as required under cl. 3(g) of the agreement. In this regard, PW2 admitted that the plaintiff did not perform the works themselves and that the works were actually done by subcontractors.

[54] Counsel's next point was that in allowing the plaintiff's claim, the judge allowed them to benefit from the illegal works. In this regard, it was I contended that the judge failed to take into account the trite legal position that no party should receive any benefit from an illegality which is within the parties' knowledge.

[55] Counsel referred to s. 66 of the Contracts Act 1950 and the Federal Court's decision in *Lori Malaysia Bhd v. Arab-Malaysian Finance Bhd* [1999] 2 CLJ 997; [1999] 3 MLJ 81; [1999] 1 MLRA 274 FC at para. 101. It was contended that the plaintiff had clear knowledge of the illegality of the works at all material times. However, the judge failed to take into account the following:

(i) The warranty given in cl. 3(a) of the agreement which showed that the plaintiff was fully aware of the need to obtain license/permit for the mining works;

(ii) The plaintiff had represented in cl. 3 or Recital B of the agreement that it had the necessary expertise and/or experience to perform the mining works; and

(iii) PW2's testimony that the plaintiff was experienced in mining works.

[56] The defendant's next complaint was that there was no basis for the judge to hold that the defendant's termination is premature as the termination crystallised prior to the expiry of the 60 days' notice and prior to the second part of the works being carried out. In response, counsel said that the issue of premature termination as found by the judge, was never pleaded by the plaintiff. The plaintiff's claim was solely for unlawful termination of the agreement.

[57] Turning next to the award of RM10.8 million, it was submitted for the defendant that there is no legal basis for the judge to award RM10.8 million as special damages to the plaintiff.

[58] According to the defendant, there was no claim in the SOC for RM10.8 million. Further, there was also no claim for *quantum meruit*. In amplification, counsel for the defendant said that:

(i) the judge failed to consider that the liability judgment had provided that the assessment of damages was limited or confined to special damages (wasted expenditure) as pleaded in para. 29 of the SOC (which was to be assessed);

(ii) the judge erred in holding that the plaintiff was entitled to RM10.8 million for completing the first stage of works;

(iii) the judge erred in awarding RM10.8 million as special damages as there was no evidence which had been produced to prove the same;

(iv) the judge relied on the plaintiff's documents which were never admitted as evidence as those documents remained as Part C documents; and

(v) the judge erred in holding that the plaintiff was entitled to the sum of RM10.8 million as special damages pursuant to s. 74 of the Contracts Act 1950.

[59] Counsel for the defendant referred to the decision of the Court of Appeal in *Voo Nyuk Fah & Anor v. Lam Yat Kheong & Anor* [2012] 5 CLJ 229; [2012] MLJU 159; [2012] AMEJ 0030 CA which held that the court should assess and make an award for damages based on established judicial principles, facts and evidence:

> [6] It is trite law that the task of accounts and assessment of damages is an exercise of judicial discretion. Such discretion is a judicial one, as it is not exercised based on whims and fancies, but by reference, guidance and application of established judicial principles and of course having regard to all the facts and evidence adduced before the officer or the judge who undertakes the assessment.

[60] Counsel emphasised that the plaintiff had pleaded (in the SOC) that it was seeking special damages being wasted expenditure incurred in performing the works. The liability judgment is clearly confined to the assessment of special damages per para. 29 of the SOC.

[61] Counsel also submitted that special damages must be properly pleaded and sufficiently particularised by the plaintiff. Reference was made to the case of *Ong Ah Long v. Dr S Underwood* [1983] 2 CLJ 198; [1983] CLJ (Rep) 300; [1983] 2 MLJ 324 FC at p. 305 (CLJ) where the Federal Court held as follows:

> It is a well established principle that special damages in contrast to general damages, have to be specifically pleaded and proved. They are recoverable only where they can be included in the proper measure of damages are not too remote

[62] Counsel submitted that there is no explanation in the GOJ as to how the judge came to the figure of RM10.8 million as wasted expenditure. In any event, the same is not supported by any evidence.

[63] It was submitted that there is no legal and/or factual basis for the High Court to depart from the claim for wasted expenditure parameter and to instead award RM10.8 million for the works purportedly done. In granting the RM10.8 million, the judge has erroneously interpreted the agreement to contain two parts and/or scope of works.

[64] It was submitted that the judge had misdirected herself in that she relied on Part C documents (which were not proven) in awarding the plaintiff RM10.8 million as wasted expenditure. It was submitted that Part C documents are not admissible as evidence. In *Lee Chye Yen & Anor v. EoneNet.Com Sdn Bhd* [2013] 1 LNS 1241; [2014] 4 MLJ 595; [2014] 3 MLRA 468; [2014] AMEJ 0217 CA the Court of Appeal held as follows:

> [19] This is what actually happened in the present case where the said statutory declaration as well as the copy of the copyright works annexed thereto were only placed in Part C of the bundles of documents. (Part C contains documents where the authenticity and the contents of the documents are disputed and not agreed upon by the parties). Surprisingly enough, those documents were not even tendered and produced in court

> when the maker or deponent ('PW1') gave evidence in court. They remained as disputed documents in Part C of the bundle of documents until the end of the trial.
>
> ...
>
> [25] The original true copy of the copyright works must form part of evidence during trial. By leaving the documents in Part C of the Bundles of Documents as disputed documents and not produced in court during trial, the documents are not evidence. It is insufficient just to make the documents available for inspection throughout the trial as suggested by the learned judge in her grounds of judgment. The documents must be properly tendered and produced as admissible evidence in court during trial.

[65] Counsel said that the supporting documents relied on by the plaintiff for its wasted expenditure claim were never admitted as evidence during the trial and even at the assessment stage. However, the judge inexplicably accepted that the documents which had been produced by the plaintiff as sufficient to justify an award of special damages of RM10.8 million. Counsel said that there is no explanation in the GOJ which could justify the award of RM10.8 million.

[66] Counsel said that the judge has failed to properly consider the admissibility and weight of the documents produced by the plaintiff in relation to the wasted expenditure. Since there is no evidence properly adduced by the plaintiff for its wasted expenditure claim, it was submitted that the judge erred in substituting the sum of RM10.8 million as special damages. According to the defendant, the judge ought to have dismissed any claim for special damages.

[67] It was also submitted that the judge failed to properly apply s. 74 of the Contracts Act 1950 in awarding RM10.8 million to the plaintiff. Pursuant to s. 74 of the Contracts Act 1950, the type of loss envisaged must be with supporting evidence to prove that the compensation sought is for actual loss and/or damage for breach of agreement.

[68] In other words, the plaintiff can only claim special damages that had been specifically pleaded, and strictly proved. Counsel referred to the Court of Appeal decision in *Macvilla Sdn Bhd v. Mervyn Peter Guan Yin Hui & Anor* [2019] 1 LNS 949; [2019] MLJU 693; [2019] AMEJ 0759 CA which explained the application of s. 74 as follows:

> [41] Both the limbs are related to special as well as general damages. As far as the special damages are concerned, it is well established it must be specifically pleaded and proved. Thus, the 'actual damage' concept envisaged in section 74 is easier for courts to assess when it relates to special damage and proved according to law.

A **The Plaintiff's Submission**

[69] We turn now to the submissions that were made on behalf of the plaintiff. Counsel's starting point was that it was the intention of the parties under the agreement that the award given to the plaintiff by the defendant is two-fold. Reference was made to recital C of the agreement dated
B 1 December 2014 which provides:

> DRP [the defendant] is desirous and has agreed to offer and OCMAB [the plaintiff] has agreed to accept the offer from DRP **to conduct works including site clearance, cut and fill as well as mineral extraction works** to be conducted on portion of the land measuring approximately a total
C of 200 acres ("hereinafter referred to as the land") with an option of a further 50 acres upon mutual agreement of both parties for the works to be done on the proposed demarcated area on the land. A layout plan of the proposed demarcated area is enclosed herewith as Appendix A.
>
> (emphasis added)

D **[70]** Based on recital C, parties had agreed that the award offered by the defendant and accepted by the plaintiff is for the plaintiff "to conduct works including site clearance, cut and fill as well as mineral extraction works". The word "as well as" was defined in Oxford Advanced Learner's Dictionary of Current English as "in addition (to)" while the Longman
E Dictionary of Contemporary English defined the word "as well as", to mean "in addition to something else".

[71] Therefore, the works which had been awarded to the plaintiff under the agreement in the first part are site clearance and cut and fill works, and in the second part, mineral extraction works. This is further reinforced by
F the letter of award dated 5 December 2015.

[72] In the letter of award dated 5 December 2015 issued by the defendant at para. 2, the defendant had set out the rates for the works to be undertaken by the plaintiff as follows:

G

Work	Price per acre	Acreage	Value
Site clearance	RM4,000	200	RM800,000
Cut and fill	RM50,000	200	RM10,000,000
		Total	RM10,800,000

H **[73]** The "description of job-scope" for the first part of the agreement was set out by the defendant at para. 3 of the letter of award dated 5 February 2015 as follows:

> (a) To perform **site clearance and preparation of the said Land for future development** purposes together with any other requirement at
I OCMAB's own cost and expenses;
>
> (b) To ensure that the Land is duly level and suitable for future development to the satisfactory of DRP; and

(c) To **undertake and perform cut and fill works** according to the need and requirement of DRP, subject to the approval of relevant authorities (if any).

[74] Based on the above paragraphs, counsel submitted that it was the defendant's obligation to pay the sum of RM10.8 million to the plaintiff for the works done in the first part.

[75] As for the second part of the agreement ie, mineral extraction works, counsel said that the payment obligation rested on the plaintiff. The letter of award dated 5 February 2015 described the second part of the agreement, as follows:

> In view of the identified minerals found on site, DRP hereby grants you the rights to extract and dispose of the same and DRP will receive from OCMAB a lump sum fee of Ringgit Malaysia Thirty Million Eight Hundred Thousand (RM30,800,000) only and proceed therefrom shall be utilised to offset cost incurred for the works stated above. The balance of Ringgit Malaysia Twenty Million (RM20,000,000) after deduction of the cost under clause 2 above shall be paid to DRP [the defendant] as per the mode of payment mentioned herein.

[76] The same payment obligation can be found at para. 3(i) of the agreement dated 1 December 2014. According to the plaintiff, the judge correctly found that the plaintiff had successfully proven that it had, *inter alia*, completed the works under the first part of the agreement. In this regard, counsel for the plaintiff referred to the evidence of PW2 (the plaintiff's director) which was undisputed during the trial and the evidence of PW3 (the defendant's former managing director).

[77] In her witness statement, PW2 said at Q & A No. 5 and 6 that the works done by the plaintiff and/or its subcontractors were as follows:

> 5. S: Apakah kerja-kerja yang telah dijalankan oleh Plaintif selaras dengan perjanjian bertarikh 1.12.2014 ini?
>
> J: Plaintif telah menjalankan kerja-kerja pembersihan tapak di mana Plaintif telah memotong dan melupuskan pokok-pokok kelapa sawit di tanah tersebut, meratakan tanah dan menyediakan tanah tersebut untuk kerja-kerja perlombongan yang akan dijalankan atau pembangunan di atas tanah tersebut.
>
> 6. S: Sila rujuk gambar-gambar di m/s 3-22 lkatan Dokumen Tambahan Plaintif. Boleh anda jelaskan tentang gambar-gambar ini?
>
> J: Gambar di m/s 3-5 ini menunjukkan kawasan tanah Defendan sebelum Plaintif memulakan kerja-kerja di tanah Defendan. Tanah Defendan tersebut dipenuhi pokok-pokok kelapa sawit dan tidak begitu rata.
>
> Selanjutnya, gambar-gambar di m/s 6-22 pula menunjukkan kerja-kerja yang telah dijalankan oleh Plaintif di atas tanah Defendan. Dari gambar-gambar ini dapat dilihat bahawa Plaintif telah

A memotong dan melupuskan pokok-pokok kelapa sawit di atas tanah Defendan dan tanah tersebut juga telahpun diratakan. Gambar di m/s 12 menunjukkan kawasan yang telah diratakan oleh Plaintif untuk Defendan.

[78] During the course of the trial, there was no cross-examination which B had been directed at PW2 on this point. In his witness statement at Q & A 16, PW3 confirmed PW2's evidence above as follows:

16. S: Sepanjang tempoh perkhidmatan anda dengan Defendan, apakah kemajuan kerja oleh Plaintif yang dapat dilihat di tanah Defendan di Mukim Sungai Karang, Kuantan tersebut?

C J: Setakat Julai atau Ogos 2015, saya mendapati bahawa Plaintif telahpun menjalankan kerja-kerja memotong pokok-pokok kelapa sawit dan selanjutnya telah ~~meratakan~~ membuang overburden tanah Defendan tersebut.

[79] PW3 further confirmed his testimony above during cross-D examination. The relevant portion of his evidence is reproduced below:

MTP So now you add the word 'membuang overburden tanah'.
A'ZMIN Yes.

MTP And that was the only thing that you saw; 'kerja-kerja memotong pokok kelapa sawit dan rata dan membuang E overburden tanah.'
A'ZMIN I don't think it's 'meratakan', it's a bit, tak berapa betul.

MTP You removed that?
A'ZMIN I removed that. What I saw is that they cleared out the pokok and they cleared out the overburden, branches, tunggul kayu F dan sebagainya, just I remember that, yes.

MTP I see. So what you meant to say was that they cut the kelapa sawit and then they have thrown away the branches –
A'ZMIN Branches, tunggul and all that.

MTP I see. And that is what you saw.
G A'ZMIN That is what I saw.

[80] According to the plaintiff, despite the fact that the plaintiff had commenced and completed the works under the first part of the agreement, the defendant nevertheless wrongfully terminated the agreement *via* the termination letter. H

[81] The termination letter contained no reasons whatsoever for the termination. Paragraphs 2 and 3 of the termination letter stated as follows:

[2] Pursuant to clause 5 of the agreement and the Variation Letter, the Company hereby gives you a sixty (60) days written notice of termination I of the agreement and the Variation Letter from the date of this letter.

> [3] Pursuant to this notice of termination, you shall immediately cease to carry out any works on the premise (Lots 12, 18 and portion of Lot 9, Mukim Sungai Karang, Daerah Kuantan, Pahang Darul Makmur) and to demobilise all of your equipment and to surrender any related documents to the company ...

[82] It is the plaintiff's case that the termination of the agreement *via* the termination letter is wrongful because it was contrary to cl. 5 of the agreement dated 1 December 2014.

[83] Clause 5.1 of the agreement dated 1 December 2014 (where the plaintiff is referred to "OCMAB" and defendant as "DRP") provided for termination as follows:

> 5.1 This agreement may be terminated by any party by way of giving the other a THIRTY (30) days written notice of their intention to do so. Furthermore, DRP may terminate this agreement **forthwith** upon occurrence of any of the following:
>
> (a) **OCMAB commits, permits or suffers to occur any breach** in the due and punctual observance of any of its obligations under this agreement and **the same is not remedied accordingly within FOURTEEN (14) days after receipt of a notice from DRP**;
>
> (b) Any distress action. Legal or execution proceedings is levied against OCMAB or judgment is entered against OCMAB, or OCMAB becomes insolvent or is subject to bankruptcy or insolvency proceedings or makes any arrangement or composition with its creditors or has a receiver or similar officer appointed for any part of its assets or undertaking; and
>
> (c) OCMAB abandons the project site, and in this regard, the project shall be deemed abandoned if, after commencement, the work has been suspended or at a standstill for a continuous period of at least THREE (3) consecutive months. Upon termination of this agreement and/or expiry of this agreement, OCMAB shall immediately cease to carry out any works on the land, except for such work which is deemed necessary for the safety and security of the land ...

[84] Based on cl. 5.1, there were two methods for termination of the agreement:

(i) by way of giving a 60 day written notice of either party's intention to terminate the agreement. In this case, termination only becomes effective upon the expiry of 60 days from the date of the said notice; or

(ii) forthwith termination by the defendant upon occurrence of events stated in paras. 5.1 (a) to (c).

[85] Counsel for the plaintiff said that although at para. 2 of the termination letter, the defendant seemed to purportedly give 60 days' notice of intention to terminate, para. 3 of the same letter was in effect an outright termination,

or termination forthwith. This was because the plaintiff was directed to immediately stop work on the land. In fact, no formal notice of termination was issued by the defendant upon the expiry of the 60 days period.

[86] The plaintiff was also stopped from entering the site upon the issuance of the termination letter. In support of this, the plaintiff referred to an email dated 30 September 2015, the contents of which are reproduced below:

> Salam Tn Haji,
>
> Just to inform your goodself that I received a call from Pn Sofia today. She informed me that at the Kuantan site, there is an existing pond which were intended to be used for the purposes of washing the bauxite then. However, due to heavy rain etc (as claimed by Pn Sofia through their contractor) the pond starts to overflow and water has sipped and damaged the compacted soil surrounding the site. The compacted soil were used as roads within the site. I'm not sure how her contractor manage to get info about the overflow of water **as they cannot enter the site**, but nonetheless, it may be necessary for our existing personnel on site to view the said pond ... (emphasis added)

[87] Referring to the above excerpts, counsel for the plaintiff said that it was clear that the plaintiff was stopped from entering the site even before 30 September 2015 although the termination (if lawful) is only effective on 11 November 2015.

[88] It was therefore submitted that the termination of the agreement *via* the termination letter was in effect a forthwith termination, rather than a notice of intention to terminate as the plaintiff was directed to cease work and in fact was stopped from entering the land immediately upon the issuance of the termination letter. On that premise and analysis, it was contended that the termination of the agreement *via* the termination letter was contrary to the provisions of cl. 5 of the agreement. Counsel said that none of the events listed in cl. 5.1(a)-(c) of the agreement had occurred and/or were communicated to the plaintiffs and therefore, the termination was wrongful and/or unlawful.

[89] In so far as motive is concerned, counsel said that it was also an undisputed fact that the defendant had engaged YHS after it terminated the agreement. SP2 in her evidence referred to an undated agreement entered between the defendant and YHS, which showed that the tribute payment payable by YHS to the defendant for the same scope of work in the second part (ie, mineral extraction works) is in the sum of RM166 million whereas in the agreement between the plaintiff and the defendant, the tribute payment payable by the plaintiff to the defendant is only RM30.8 million.

[90] Counsel relied on *Treitel's The Law Of Contract*, 14th edn at paras. 18-036, where the learned author Edwin Peel, said:

> It sometimes happens that a party's real motive for wishing to terminate is not that there has been some failure in performance, but that the contract was, or has because of the market movements become, a bad

bargain for him [*Cornwall v. Henson* [1900] 2 Ch. 298]. In such circumstances the courts will often (if the case is one to which the general requirement of substantial failure applies) hold that the failure in performance is not sufficiently serious and so refuse to allow termination.

[91] According to counsel for the plaintiff, PW2 and PW3's evidence on works done by the plaintiff on the land ie, site clearance and cut and fill works which were completed, was uncontroverted during the course of the trial. There was therefore no issue of non-performance of agreement on the part of the plaintiff that was ever raised by the defendant.

[92] Yet, the defendant nevertheless terminated the agreement *via* the termination letter without even assigning any reason for the termination and without giving any opportunity to the plaintiff to rectify any purported breach of the agreement.

[93] According to counsel, based on the available facts during the trial, it was clear that the defendant benefited from unlawfully terminating the agreement since the defendant had not paid any monies for the works which had been done and completed by the plaintiff on the land (which also amounts to unjust enrichment). Yet further, the defendant entered into a new agreement with YHS only for the second part of works (ie, mineral extraction works) with tribute payment of RM166 million which is five times higher from what the defendant is expected to gain from the agreement with the plaintiff.

[94] It was therefore submitted that the termination of agreement by the defendant *via* the termination letter was contrary to cl. 5.1 of the agreement, and which was clearly motivated by greed, is wrongful and unlawful.

[95] According to the plaintiff, the defendant's so-called ground of termination was only raised for the first time *via* para. 39 of the defence where the defendant took the position:

(i) that the plaintiff purportedly failed to obtain the necessary license for mineral extraction works on the land pursuant to cl. 3(a) of the agreement (para. 6 of the defence);

(ii) that the plaintiff purportedly failed to provide monthly progress pursuant to cl. 3(g) of the agreement (para. 13 of the defence); and

(iii) that the plaintiff purportedly failed to make payments to the defendant as agreed in the agreement (para. 21 of the defence).

[96] In response, it was submitted for the plaintiff that:

(i) the above allegations were never raised by the defendant during the course of the agreement; and

A (ii) despite the plaintiff's letter dated 14 September 2015 wherein the plaintiff had appealed against the termination and requested for clarification as to the grounds of termination, the defendant kept silent and never communicated any of the above grounds to the plaintiff.

B **[97]** According to the plaintiff, these allegations, which were only raised in response to Suit 140, are an afterthought and are in any event, untenable.

[98] According to the plaintiff, no license is required for the works under the first part of the agreement and that in any event, it is only the defendant who can apply for proprietary mining license under s. 81 Mining Enactment.

C **[99]** The plaintiff contends that the alleged breaches are not fundamental breaches of the agreement and could have been rectified if the defendant had given due notification and given the plaintiff a fair opportunity (14 days) to rectify the alleged breaches.

D **[100]** In amplification, it was submitted that the defendant's contention *vis-a-vis* the requirement of a mining licence prior to the commencement of the initial clearing works is flawed as cl. 3(a) did not stipulate as a pre-condition, that the plaintiff must have all the necessary licences upon entering into the agreement. Instead, cl. 3(a) provides that the plaintiff "shall have all the necessary licenses for the purposes of undertaking the above E scope of work **and shall procure any other licenses** and approval as required by the relevant authority" (emphasis added)

[101] Therefore, cl. 3(a) allows the plaintiff to procure any licence as required by the authority even after the agreement was entered. The plaintiff cannot be said to be in breach of the agreement when performance of the F same is still not due. On the other hand, the works awarded to the plaintiff under the first part of the agreement is for site clearance and cut and fill works for payment in the sum of RM10.8 million payable by the defendant to the plaintiff.

G **[102]** In this regard, it was emphasised that the judge had made a finding that the plaintiff has commenced and completed site clearance and cut and fill works on the land. The agreement was terminated by the defendant before the plaintiff was able to commence the works under the second part of the agreement ie, mineral extraction.

H **[103]** Therefore, it was submitted that as at the date of termination, wherein the site clearance and cut and fill works have just been completed, no mining licence is required to be obtained by the plaintiff as the works under the first part did not involve mineral extraction.

[104] It was submitted for the plaintiff that in any event, under the Mining I Enactment, a proprietary mining licence can only be applied for by the land owner, ie, the defendant in this case. Counsel for the plaintiff emphasised that there are two types of mining licence under the Mining Enactment:

(i) individual mining License as prescribed under s. 35 of the Mining Enactment; and

(ii) proprietary mining license as prescribed under s. 81 of the Mining Enactment.

[105] The difference between these two types of licence is that an individual mining licence may be granted over any State land which had been declared to be an individual mining area. The definition of State land is to be found in s. 34 of the Mining Enactment and in s. 5 of the National Land Code. On the other hand, a proprietary mining licence may be granted to the owner or proprietor of an alienated land. In the present case, the land is an alienated land. Hence, only a proprietary mining licence may be granted over the land. Section 81(1) of the Enactment provides as follows:

(i) An application for proprietary mining license **shall be made by the owner of any alienated land** to the State Authority in the prescribed form.

[106] In view of the above provision, it was submitted for the plaintiff that the defendant's suggestion that the plaintiff must obtain the necessary mining licence is untenable especially since (i) no mining works had commenced; and (ii) the law clearly stipulates that the application for proprietary mining licence (which is applicable to this case) shall be made by the defendant *qua* landowner. Hence, counsel submitted that the termination of the agreement *via* the termination letter was unjustified as being contrary to cl. 5.1 of the agreement and was accordingly invalid and unlawful.

[107] In any event, it was submitted for the plaintiff that if at all there was any breach on the plaintiff's part as alleged by the defendant, the alleged breach is merely a breach of warranty and is not a fundamental breach of the terms and condition of the agreement.

[108] The plaintiff referred to cl. 3(a) and 3(g) of the agreement which provides:

3. OCMAB'S WARRANTS AND COVENANTS

OCMAB **hereby warrants** and covenants with DRP as follows:

(a) That OCMAB have all the necessary licences for the purposes of undertaking the above scope of work and OCMAB shall procure any other licences and approval as required by the relevant authority at OCMAB's cost and expenses;

...

(g) In view of the above, OCMAB shall also provide and furnish DRP with a comprehensive monthly report on work progress for the previous month on or before the 15th day of the following month commencing from the commencement date until the completion of the works;

[109] The clause relates to warranties and contains the phrase "OCMAB hereby warrants" which shows a clear intention that it is in regard to a warranty in the true sense of the word and therefore, the plaintiff should have been given an opportunity to remedy the breach of warranty (if any).

[110] Yet, since the defendant never communicated the ground(s) of the unlawful termination to the plaintiff, the latter was never afforded the opportunity to remedy the alleged breach(es).

[111] Counsel for the plaintiff said that the defendant had made payments in the sum of RM4.9 million to one of the plaintiff's subcontractors, namely HTS. This fact was revealed by DW2, the former Managing Director of HTS during his examination in chief:

> ABS: Alright My Lady. Ok. En Yahya, can I refer you to bundle C. At page 12, to page 16. This is one of the part C documents My Lady. I have the originals with me. I'll give it to my learned friend to see if she has any objections. He is the maker of that document. It's a letter and the claim submitted by HTS. So that's the original My Lady. I think parties are in agreement to put it in part B of this document. Page 12 to page 16 of bundle C.
>
> Ok En Yahya, can you please tell the court what is the status, what is the current status of this claim that you have made. That HTS has made against the plaintiff?
>
> YAHYA: Yang Arif when we. When I made this claim, which was on the 26.10.2015 ... we waited for quite some time and there was no response from the plaintiff. And thereafter we seek the clients consideration of making payment to our claim and on in 2016, the client has agreed to pay on page 16, for item A, B and E which:
>
> ...
>
> YAHYA: A site clearance. B Excavate bauxite. And E is performance bound which amount to about RM4.9 million.
>
> ABS: And En Yahya just to verify, who is the client that you were referring to in your answer?
>
> YAHYA: Damansara Realty Pahang.
>
> ABS: **The defendant in this case?**
>
> YAHYA: Oh **yes**.

[112] Counsel for the plaintiff emphasised that under the "letter of appointment as sub-contractor" dated 6 March 2015 which was issued by the plaintiff to HTS, the terms "description of job-scope" therein are exactly similar to the terms of the agreement per the letter of award dated 5 February 2015.

[113] In the "pernyataan pembelaan" the defendant alleged that it terminated the agreement purportedly because the plaintiff failed to procure the relevant mining licence and hence, the plaintiff is not entitled to any payment. Yet, the defendant paid a sum of RM4.9 million to a third party, HTS, although DW2 himself admitted during cross-examination that HTS did not have any mining licence.

> MMR So since HTS does not have any experience in doing mining works, am I also correct to say that HTS also does not have any mining licence?
>
> YAHAYA **We don't have any mining licence**.

[114] Counsel therefore said that the defendant is not only biased against the plaintiff and went overboard in paying RM4.9 million to a third party, with whom they have no contractual relation, and who also did not have any mining licence.

[115] In so far as damages are concerned, it was contended that the defendant was in breach of cl. 5.1 of the agreement when it terminated the agreement forthwith, *albeit* that none of the events listed in cl. 5.1(a)-(c) of the agreement had occurred.

[116] As a result of the defendant's breach of agreement, the plaintiff is entitled to claim for wasted expenditure pursuant to s. 74 of the Contracts Act 1950. Section 74(1) of the Contracts Act 1950 provides:

> Compensation for loss or damage caused by breach of agreement
>
> 74.(1) When a contract has been broken, the party who suffers by the breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from the breach, or which the parties knew, when they made the contract, to be the likely result from the breach of it.

[117] In the alternative, counsel said that if the court finds the agreement to be void, then the plaintiff is still entitled to be compensated for its losses incurred for the works already done on the land pursuant to s. 66 of the Contracts Act 1950 which provides:

> 66. Obligation of person who has received advantage under void agreement, or contract that becomes void
>
> When an agreement is discovered to be void, or when a contract becomes void, any person who has received any advantage under the agreement or contract is bound to restore it, or to make compensation for it, to the person from whom he received it.

[118] Reference was made to the decision of the Privy Council in *Menaka v. Lum Kum Chum* [1976] 1 LNS 181; [1977] 1 MLJ 91; [1977] 1 WLR 267; [1976] 12 WLUK 157, which dealt with s. 65 of the Indian Contracts Act 1872 (identical to s. 66 of the Contracts Act 1950) and ruled:

A In that way effect will be given to section 65 under which **each party is bound to restore any advantage which he has received to the person from whom he received it** – see *Govindram Seksaria v. Radbone* where Lord Morton of Henryton said:

> The result of section 65 of the Indian Contract Act was that, as
B from (the date on which the contract became void) **each of the parties became bound to restore to the other any advantage which the restoring party had received under the contract** of sale.
>
> (emphasis added)

[119] In the present case, the plaintiff had completed site clearance and cut
C and fill works which formed the first part of the agreement and expended substantial sums for the purpose of completing the works under the first part of the agreement. Further, the plaintiff had also paid the sum of RM2 million to the defendant for the rights to extract mineral under the second part of the agreement.

D **[120]** As at the date of termination, the defendant had the benefit of the land which has been cleared of all timber and topsoil. On the other hand, the plaintiff received nothing for the works which had been carried out under the agreement. It was therefore submitted that the defendant, being the party which received the advantage under the agreement, is bound to compensate
E the plaintiff for the benefit it had received from the plaintiff.

[121] According to counsel, it is clear from the evidence that:

(i) HTS as the plaintiff's subcontractor had issued a claim in the total sum of RM10,593,173.60 for the works done on the lands; and

F (ii) the works done are excavation of earth, stockpiling, levelling, as well as site clearance works on a portion of the lands.

[122] The defendant in the present case never raised any issue of "non-performance of works" against the plaintiff. In the circumstances, based on the evidence of PW2, PW3 and DW2 on the works which had been
G carried out over the land, and the fact that "non-performance of works" was never an issue in this case, it was clear that the plaintiff had successfully proven that it had commenced and completed the works under the first part of the agreement.

H **[123]** As such, it is submitted that the judge had correctly exercised her power under the omnibus prayer in the SOC in ordering the defendant to pay the sum of RM10.8 million to the plaintiff for the works done by the plaintiff under the first part of the agreement. Counsel said that the defendant should not be allowed to be unjustly enriched to the plaintiff's detriment especially since the defendant had unlawfully terminated the agreement in order to gain
I a better financial benefit *via* the agreement with YHS.

Analysis And Conclusion

[124] We shall first deal with Appeal 2289 which pertains to the question of liability *vis-a-vis* termination of the agreement. The starting point in relation to the law on the interpretation of a termination clause in a contract is that it has to be construed strictly. There is no room for any loose, ambivalent or ambiguous approach to the manner in which the termination clause is to be construed.

[125] The reason for the imposition of a strict approach is quite obvious. Any termination of a contract will almost inevitably result in financial, reputational, legal and other consequences on the party whose contract is being terminated. In this regard, it is apposite to refer to the recent decision of the Federal Court in *Catajaya Sdn Bhd v. Shoppoint Sdn Bhd And Ors* [2021] 3 CLJ 159; [2020] MLJU 2333; [2020] MLRAU 367 FC particularly paras. 62-64 which read as follows:

> [62] Against the factual matrix of the case before us and after upon careful perusal of the terms of the SSA, with respect we are of the considered view that both the Court of Appeal and the High Court did not accord sufficient judicial appreciation of the terms of the SSA and had failed to take into account the prerequisites of termination under Sections 11 and 12 SSA as well as misconstrued the provision of the aforesaid clauses in particular, the non-adherence of Section 12 SSA by the Respondents.
>
> [63] Reading the terms of the SSA in its entirety, we find that there is no latent ambiguity; the obligations of the parties are specifically defined. *Termination is not permitted unless as expressly stipulated under SSA. Notice must be given to the Appellant to rectify the identified breach and take steps to rectify that breach within the prescribed time as agreed. There must be strict adherence to the clauses in an agreement which relates to termination*.
>
> [64] *Termination of an agreement results in the end of the parties obligations. Reading the provisions of Sections 11 and 12 of the SSA the party in breach must be notified of the identified reason for termination as well as be given the opportunity to rectify the breach*. The Federal Court in *SPM Membrane* (*supra*) emphasised the importance of giving effect to the specific requirements of a termination clause, failing which a notice of termination would be defective ... (emphasis added)

[126] No doubt, under cl. 5.1 of the agreement, the defendant had the contractual right to terminate the agreement by giving 60 days' notice of termination without ascribing any reasons ie, termination *simpliciter*. Thus, it was an agreed term that the defendant could terminate the agreement by giving 60 days' notice of termination without predicating it on any reason. However, by the same token, we cannot ignore the fact that the letter of termination had also demanded that the plaintiff should "cease operations and demobilise immediately". Clause 5.1 of the agreement reads as: "This agreement may be terminated by any party by way of giving the other a 30 days written notice of their intention to do so ...". The period of 30 days was later mutually varied to 60 days.

[127] The defendant opted to use this route of termination, ie, termination *simpliciter* (without cause) rather than termination for cause *via* cl. 5.1(a) which allowed for termination "forthwith upon the occurrence of any of the following" – "(a) [the plaintiff] commits, permits or suffers to occur any breach in the due and punctual observance of any of its obligations under this agreement and the same is not remedied accordingly within 14 days after receipt of a notice from (the defendant)".

[128] There is no dispute that the defendant's present complaints against the plaintiff, per the defence, were never raised at the material time. Further, the plaintiff was never afforded the 14 days period as per cl. 5.1(a) so as to regularise or remedy any purported breach.

[129] What is clear is that the defendant chose not to rely on any reason for the termination. They chose not to terminate for cause. Instead, they chose the easier path, or the path of least resistance, ie, termination *simpliciter*. Thus, it was termination with a notice period of 60 days. We do not think that it was open to the defendant to then proffer any purported reasons in seeking to justify the termination.

[130] In a sense, it would appear that by not relying on any reason for the termination, the defendant had relinquished or abandoned the right to raise any reason/cause to justify the termination. The premise of our conclusion in this regard lies in the fact that termination for "cause" was an avenue which was open to the defendant but they choose not to take that route. Indeed, if they had taken that route, then they would have been contractually obliged to notify the plaintiff of their breach(s), if any, and give them 14 days to remedy any purported breach.

[131] At any rate, confining the present discussion to termination *simpliciter*, the question is whether it was *status quo* during the 60 days period or were the plaintiff prevented from carrying on with their work during that period.

[132] Of course, contractually, what ought to happen upon a termination was already spelt out in cl. 5.1 which reads as, "Upon termination of this agreement and/or expiry of this agreement, (the plaintiff) shall immediately cease to carry out any works on the land, except for such work which is deemed necessary for the safety and security if (*sic*) the land. (The plaintiff) also shall, upon termination of this agreement, demobilise their equipment and immediately return and/or deliver possession of the land together ..."

[133] The plaintiff says that they were in fact prevented from having any access to the site at least as at 30 September 2015 (see plaintiff's email). But, during the trial (ref Q.23 witness statement) DW1 said that as at 25 November 2015, the plaintiff had still not vacated. The defendant lodged a police report in relation to the plaintiff's alleged continued presence on the land. Apparently, DW1 was not cross-examined on this point.

[134] In our view, the germane question is whether pursuant to the letter of termination, the agreement was truly and factually alive and extant for 60 days, or conversely or whether the agreement was for all intents and purposes terminated forthwith. In this regard, the contemporaneous documentary evidence, *to wit*, the plaintiff's email dated 30 September 2015, demonstrates quite compellingly that as at that date, the plaintiff was denied entry to the land. We do not see how the defendant could contend otherwise and say that the plaintiff was on the land.

[135] From the evidence, it does not appear that the plaintiff was allowed into the land during the 60 days period. They were kept out and were prevented from carrying out their obligations under the agreement.

[136] Indeed, the fact that the plaintiff was asked to demobilise immediately (*albeit* per cl. 5 of the agreement) necessarily means that it was not *status quo* and it was definitely not business as usual. Looking at all the circumstances, we are impelled to the conclusion that despite giving the 60 days' notice, the termination was for all intents and purposes, a termination which was forthwith or immediate.

[137] And if it was termination forthwith, then it was necessary that the termination must be for cause and that means the reason(s) for termination or rather, the breach that was purportedly committed by the plaintiff, must be brought to their attention and they must be given the period of 14 days to remedy the breach (if any). Hence, if it is termination for cause, then the termination clause was not complied with. In the circumstances, we agree with the judge that the plaintiff was not in fact on the land for the duration of the 60 days' notice period and they were kept out.

[138] Thus, if it was termination "forthwith", then the notice of termination is bad because the defendant did not refer to any purported breaches by the plaintiff in accordance with cl. 5.1 of the agreement and did not give them 14 days to remedy any alleged breach. We therefore agree with the judge's finding that the termination of the agreement was unlawful.

[139] In any event, as regards the issue of illegality, we think that it is highly pertinent to refer to the evidence of DW4. It may be recalled that DW4 was the Assistant Director (Minerals) and Head of Minerals Units at PTG. The relevant parts of DW4's evidence reads as follow:

> lkram : *Sebelum sebarang kerja perlombongan dibenarkan atau diluluskan oleh, dilaksanakan di negeri Pahang, individu atau syarikat perlu mendapatkan tenemen mineral atau lesen mineral yang dikeluarkan oleh pihak berkuasa negeri.*
>
> ...
>
> ABS : ... adakah *kerja-kerja pra-perlombongan ataupun preparatory works untuk lombong, adakah kerja- kerja itu juga memerlukan sebarang lesen dan permit?*

A

lkram : *Ya, perlu.*

...

ABS : Ok. Sekarang En lkram, perenggan 16 hingga 22, Penyataan Tuntutan tersebut adalah kerja-kerja yang Plaintif dakwa Plaintif telah lakukan bagi kes ini. Sekarang saya nak tanya En. lkram, *adakah sebarang lesen atau permit perlombongan diperlukan untuk kerja-kerja yang didakwa telah dilakukan oleh Plaintif dalam perenggan-perenggan tersebut?*

B

lkram : *Berdasarkan Enakmen Mineral 2001 Negeri Pahang, perlu untuk mendapatkan lesen mineral atau tenement mineral bagi kerja-kerja yang disebutkan berdasarkan perenggan tadilah, Yang Arif.*

C

...

lkram : ... berdasarkan Seksyen 158, Enakmen Mineral ada menyebut sekiranya terdapat sebarang aktiviti perlombongan tanpa lesen, jika disabitkan kesalahan, boleh diambil tindakan iaitu penjara 10 tahun atau denda tidak melebihi RM500,000, atau kedua-duanya sekali. ltu tertakhluk [*sic*] di bawah Seksyen 158, Enakmen Mineral.

D

ABS : 158, ok. Dan saya nak tanya apa tu, kesalahan-kesalahan yang tadi En lkram nyatakan tersebut, adakah denda atau penjara tersebut akan dikenakan kepada kontraktor melombong, ataupun pemilik tanah lombong tersebut?

E

lkram : Yang Arif, kalau berdasarkan kes yang berlaku di atas tanah milik, PTG akan mengambil tindakan kepada pemilik tanah atau orang yang memegang, dilantik sebagai pemegang amanah oleh pemilik tanah.

F

...

lkram : Berdasarkan kaedah yang digariskan di bawah Enakmen Mineral, kerja-kerja, sebarang kerja-kerja yang berkaitan dengan mineral dipanggil sebagai kerja-kerja permulaan bagi perlombongan, termasuklah kerja-kerja untuk mengeluarkan hasil di atas muka bumi seperti balak, kerja-kerja untuk meratakan tanah atau kerja-kerja untuk mengorek levelling tanah. Ia sebahagian daripada kerja-kerja perlombongan, yang perlu mendapat kelulusan lesen mineral, yang mana perkara tersebut digariskan dalam Operating Mining Scheme yang akan dikeluarkan selepas tenemen mineral itu diperolehi.

G

H

ABS : So ini termasuk sebarang kerja-kerja pengorekan tanah, levelling, dan juga apa tadi, senarai yang Encik?

lkram : Pengeluaran hasil di atas permukaan tanah.

I

ABS : Pengeluaran hasil, ok. So ini pun termasuk sebagai kerja perlombongan (11:50:40AM) yang memerlukan sebarang permit ataupun lesen daripada PTG?

Ikram : Betul.

ABS : ... untuk perlombongan bauksi ini, apakah kerja-kerja perlombongan yang selalunya terlibat, preparatory works bagi perlombongan, specifically untuk perlombongan bauksit?

Ikram : Untuk perlombongan bauksit. Yang Arif, mineral bauksit adalah mineral yang berbeza daripada mineral-mineral lain, di mana kandungan bauksit ini mudah diperolehi di atas permukaan tanah. So kaedah atau kerja-kerja biasa yang digunakan sebelum dikeluarkan bahan mineral bauksit ini adalah kerja-kerja meratakan tanah atau membuang topsoil di atas tanah.

So berdasarkan SOP sedia ada, selepas topsoil, permukaan tanah ini dikeluarkan, dan mineral tu terus boleh dikeluarkan dan dilombong seperti biasa.

...

MMR : ... Proprietary Mining License, *bagi lesen ini, hanya tuan punya tanah saja yang boleh memohon lesen ini. Betul*?

Ikram : Betul, tertakluk di bawah Seksyen 81, Enakmen Mineral.

MMR : Dan sekiranya sesuatu pihak lain yang tidak mempunyai tanah untuk membuat perlombongan, pihak tersebut tidak boleh memohon PML ini. Betul? Bukan tanah dia, jadi dia tak boleh pohon PML?

Ikram : Boleh, sekiranya pihak tersebut telah diberikan Power of Attorney, diberikan, dilantik sebagai pemegang amanah iaitu kita letakkan di bawah Seksyen Wakil Kuasa di bawah Akta Wakil Kuasa.

MMR : Boleh sekiranya diberikan perwakilan oleh tuan tanah?

Ikram : Dilantik sebagai pemegang amanah yang didaftarkan di Mahkamahlah.

MMR : Untuk Lesen Pajakan Melombong dan Lesen Cari Gali pula, sekiranya sesuatu pihak ingin memohon lesen-lesen ini, tetapi untuk melombong di tanah suatu pihak yang ketiga, adakah sebarang kebenaran diperlukan oleh tuan punya tersebut?

Ikram : Soalannya sekiranya pihak ketiga ingin melombong di tanah kepunyaan orang lain?

MMR : Ya.

Ikram : Boleh atau tidak, di dalam enakmen, sebenarnya tidak dinyatakan boleh atau tidak. Tetapi yang boleh melombong, **yang ada hak untuk melombong di atas tanah milik adalah pemilik tanah sahaja**.

MMR : Pemilik tanah sahaja.

...

A MMR : ... Saya ambil perenggan 16 dulu, ya Encik. lni adalah kerja-kerja pembersihan tapak pembinaan yang dilakukan. Jadi soalan saya, Encik sekiranya *hanya kerja pembersihan tapak sahaja yang dilakukan dan seterusnya tiada aktiviti melombong, adakah apa-apa lesen yang perlu dipohon oleh kontraktor yang menjalankan kerja pembersihan tapak ini*?

B lkram : Ok. *Untuk kerja-kerja selain yang tidak melibatkan mineral, bagi sebarang kerja-kerja pembersihan tapak atau kerja-kerja tanah ini tertakluk di bawah KM, Kebenaran Merancang yang dikeluarkan oleh pihak Majlis Perbandaran Kuantan*.

C MMR : *Ok. Jadi bukan di bawah bidang kuasa PTG*?

lkram : *Bukan di bawah bidang kuasa PTG*.

MMR : Ok. Seterusnya saya ingin rujuk Encik ke perenggan 21. Ok. Jika Encik lihat ayat kedua di sini, Plaintif juga telah mengaturkan untuk menempatkan jentera basuh yang sesuai, untuk mencuci

D bauxite dan selanjutnya.

Jadi soalan saya Encik, sekiranya kerja yang dilakukan hanyalah mengaturkan untuk meletakkan, untuk menempatkan jentera basuh, belum lagi menempatkan, Cuma aturkan saja, adakah lesen diperlukan? Adakah lesen melombong diperlukan?

E lkram : Jawapan dia ya. Sebab sebarang kerja-kerja sama ada kerja-kerja pembersihan atau susunan dalam lombong ini, tertakluk di bawah kelulusan Operating Mining Scheme. Skim Pengendalian Lombong yang dikeluarkan setelah lesen mineral diperolehi.

MMR : Jadi jawapan Encik, walaupun hanya buat aturan saja, baru

F arrange –

lkram : Betul. Arrangement tu by right sepatutnya mendapat kelulusan daripada pihak berkuasa negeri juga.

MMR : Bagaimana pula kerja-kerja untuk mendapatkan perkhidmatan subkontraktor dan jentera untuk kerja sekiranya kontrakor [*sic*]

G utama ingin mendapatkan subkontrakor [*sic*] atau jentera, adakah ini juga suatu kerja yang untuk proses melombong?

lkram : ltu, tidak.

MMR : Ok. Saya berbalik kepada isu berkenaan removal of topsoil, pengeluarkan topsoil. Jadi *sekiranya pihak kontraktor mengeluarkan*

H *topsoil ni tanpa sebarang niat untuk melakukan perlombongan, adakah itu dianggap sebagai aktiviti melombong*?

lkram : *Tidak. Sekiranya mendapat kebenaran yang lain yang di luar kemudahan daripada melombong, contohnya sekiranya ingin mengangkut pasir, mengangkut topsoil ni dari lesen dikeluarkan oleh*

I *Pejabat Daerah dan Tanah, atau digariskan dan diluluskan di bawah Kebenaran Merancang, so PTG tidak mempunyai sebarang kuasa untuk mengaitkan dengan mineral*.

...

MMR : Dalam enakmen ini, ok. Sepanjang pengetahuan Encik, adakah sebarang tindakan telah diambil terhadap Plaintif di dalam tindakan ini oleh pihak PTG?

Ikram : Setakat pengetahuan saya, *Yang Arif itu di luar daripada makluman saya. Sebab dia melibatkan unit kuasa yang dipisahkan terus daripada unit saya*.

...

ABS : ... kerja-kerja menyediakan mana-mana tapak ataupun tanah sebagai kawasan perlombongan, untuk penyediaan sebagai kawasan perlombongan, adakah kerja-kerja tersebut memerlukan permit dan atau lesen daripada pihak PTG?

Ikram : Perlu.

(emphasis added)

[140] DW4 agreed with counsel's suggestion that only the land owner can apply for a licence under s. 81 of the Mining Enactment. He also said that there are aspects of earthworks which fall within the jurisdiction of the local authority (MPK) rather than PTG.

[141] DW4 was quite specific when he said that levelling work and clearing of existing timber on the land would not require a licence if it is not meant to yield minerals from the topsoil.

[142] Hence, the question is whether the removal of topsoil that was undertaken by the plaintiff (or their sub-contractor), was part of mining works. Looking at the agreement in totality, it does not appear to be the case that it was envisaged that the bauxite deposits in the topsoil was to be part of the extraction process. The bauxite mining that was envisaged under the agreement was in respect of subterranean deposits of bauxite.

[143] However, the problem here is that under s. 81, it is the owner of alienated land (the defendant) who has to procure the licence. But the defendant maintains that under s. 81 of the Mining Enactment, the plaintiff could have applied for a proprietary mining licence. In this case, the defendant did not themselves apply for a licence. Neither did the plaintiff. We do not see how the plaintiff could have made such an application in their own name. Being a third party, the plaintiff could not apply for the requisite licence without a power of attorney.

[144] At any rate, the plaintiff's position is that they could procure a licence later ie, before commencing stage 2 of the works under the agreement to extract minerals. Plainly, the defendant did not themselves apply for a proprietary mining licence.

[145] If the defendant did not apply for the licence, then they ought at the least, to have clothed the plaintiff with the requisite authority by way of a power of attorney to enable them to obtain the requisite licence. But none

A of that was done. It is important to bear in mind that cl. 5.1(a) of the agreement provides that if the plaintiff is in breach, then they should be given 14 days to remedy the breach.

[146] Again, the plaintiff was not given the requisite notice period within which to remedy the breach. It is also significant that PTG took no action B against the defendant, or the plaintiff for any breach or contravention of the Mining Enactment. Further, despite having knowledge that the sub-contractor, HTS did not have any licence under the Mining Enactment, the defendant proceeded to pay them RM4.9 million.

C **[147]** In our view, the defendant ought to have made it possible for the plaintiff to have procured such a licence for the second stage of the works to be undertaken under the agreement. On this point, we agree that there were two stages of works under the agreement and the plaintiff had completed the first part of the works under the agreement.

D **[148]** Thus, looking at the circumstances here, we do not think that the defendant can rely on illegality to justify the termination of the agreement.

[149] In the circumstances, we found no merit and accordingly dismissed Appeal 2289 (on liability).

E **[150]** We turn next to Appeal 685 (on assessment of damages). Here, we were impelled to the view that there was merit in the appeal. We start by making the significant observation that in delivering her decision on liability, the judge had only allowed the plaintiff to claim the items in para. 29 of the SOC ie, wasted expenditure of RM15,833,484.16 which was subject to assessment on the later date. The judge specifically disallowed prayers 35(3) F and (4) of the SOC. The plaintiff did not appeal or cross-appeal against the judge's said ruling pertaining to (prayers 35(3) and (4) of the SOC).

[151] During the assessment stage, the plaintiff did not adduce any fresh documentary evidence during the trial and just relied on the earlier trial documents which were in Part C and not marked as exhibits. G

[152] Part C documents are documents which are disputed as to their authenticity, existence and contents. Thus, the original documents have to be produced and marked as "ID" and later converted to exhibits. The process requires the maker to be called to establish the authenticity and contents of H the documents. Part C documents are usually for documents which are of suspicious or dubious provenance. As a rule of thumb, Part C documents are for documents which are said to be fake, forged or fictitious. But in practice, it is not unusual for parties to insist on innocuous or benign documents being placed in Part C.

I **[153]** The reasons for doing so may be spurious, strategic or tactical. It is also possible that the purpose of placing documents in Part C is just to make life difficult for the other side who intend to rely on those documents. Trial judges have an overriding duty to conduct active case management to ensure

that documents in Part C are "genuinely disputed". Trial judges should not passively allow parties to dictate that documents should be in Part C. Parties who insist on placing documents in Part C must therefore satisfy the judge that there is a valid and acceptable reason for doing so. The reason is obvious. It would be unjust to allow parties to impose an unfair burden on the other side by tactically insisting on documents being placed in Part C. To allow parties to indiscriminately insist on documents being placed in Part C would also be an unfair burden on the court and a waste of judicial time.

[154] At any rate, in the present case, no attempt was made by the plaintiff during the assessment of damages stages to introduce the Part C documents as ID exhibits through s. 32 or s. 73A Evidence Act 1950.

[155] It is important to emphasise that para. 29 of the SOC is a claim for special damages which must be specifically pleaded (which has been done) and strictly proven (which has not been done).

[156] The principle in relation to special damages is trite, ie, it must be specifically pleaded (and particularised) and strictly proven. In *Ong Ah Long* (*supra*), Justice Syed Agil Barakbah FCJ (pp. 305 (CLJ); pp. 327-328 (MLJ)) speaking for the Federal Court explained the principle in the following words:

> It is a well-established principle that special damages in contrast to general damages, have to be specifically pleaded and strictly proved. They are recoverable only where they can be included in the proper measure of damages and are not too remote (see *Halsbury's Laws of England* 4th edition, volume 11 page 218 para 386). That in our view is the cardinal principle adopted by all courts both in England and this country. The same principle was adopted by Ong Hock Thye, F.J. (as he then was) in *Yee Hup Transport & Co and Anor v. Wong Kong* [1967] 2 MLJ 93 which was an appeal on quantum of damages. Quoting an excerpt from the judgment of Wilmer L.J. in *Ilkiw v. Samuels* [1963] 1 WLR 991; [1963] 2 All ER 879 he held that the general damages should not be awarded as though they were special damages properly pleaded and proved. Similarly Chang Min Tat, F.J. (as he then was) in *Murtadza bin Mohamed Hassan v. Chong Swee Pian* [1980] 1 MLJ 216 applied the principle in *Ilkiw v. Samuels* (*supra*) that special damages if pleaded as in that case could be recovered. The principle was also adopted by Mohamed Azmi, J. (as he then was) in *Sam Wun Hoang v. Kader Ibramshah* [1981] 1 MLJ 295 in the Federal Court.

[157] In *Ilkiw v. Samuels* [1963] 2 All ER 879; [1963] 1 WLR 991, 107 Sol Jo 680 CA 1950 Diplock LJ (p. 890 All ER):

> As regards the question of damages, I would put it in this way. Special damage in the sense of a monetary loss which the plaintiff has sustained up to the date of trial must be pleaded and particularised.

A *... In my view, it is plain law - so plain that there appears to be no direct authority, because everyone has accepted it as being the law for the last hundred years - that one can recover in an action only special damage which has been pleaded, and, of course, proved.* (emphasis added)

[158] It is settled law that where a document is sought to be proved in order B to establish the truth of the facts contained in it, the maker has to be called (see: *R v. Gillespie* [1967] 51 Cr App Rep 172; *R v. Plumer* [1814] R & R 264; *Hill v. Baxter* [1958] 1 QB 277; *R v. Moghal* [1977] Crim LR 373). Non-compliance with this rule will result in the contents of the documents being hearsay. The evidential effect of a document which has not been C properly proved was described by Abdoolcader J (as he then was) in *PP v. Datuk Hj Harun Hj ldris & Ors* [1977] 1 LNS 92; [1977] 1 MLJ 180; [1977] 1 MLRH 438 OCJ at p. 183 (MLJ) in the following terms:

> It is necessary to refer to certain exhibits which have been put in the course of these proceedings for identification but have not in fact been D proved as they should have been and are accordingly not exhibits in the strict sense and cannot therefore form part of the record in this case, namely, D41 and D43 which were both put in for identification only and which are the audited accounts and annual report of the Bank for the years 1973-1974 and 1972 respectively.
>
> E *As these two exhibits have not been proved and properly admitted as such, they must in the ultimate analysis be discounted and I shall accordingly disregard references to them and also all oral testimony as well adduced in relation thereto ...*
>
> (emphasis added)

[159] Plainly, there was no evidence to prove the items of wasted F expenditure per para. 29 of the SOC. The claim for special damages should have been dismissed. The judge ought not to have substituted para. 29 of the SOC with the rates stipulated in the letter of award of RM10.8 million as it was not pleaded and is not part of para. 29 of the SOC.

[160] In any event, we find that the plaintiff has not proven that they are G entitled to RM10.8 million as per the letter of award. As such, the sum of RM10.8 million was wrongly awarded to the plaintiff. As rightly submitted by counsel for the defendant, the sum of RM10.8 million was only sought by way of the written submissions that were filed on behalf of the plaintiff.

[161] Indeed, it can be seen from the plaintiff's submissions in the High H Court that RM10.8 million was sought as an alternative to their original claim for wasted expenditure. In our view, the judge should not have entertained the submission for RM10.8 million and ought to have confined herself to the claim that was allowed ie, para. 29 of the SOC (subject to assessment). Thus, the only question is whether the plaintiff had tendered the I requisite evidence to prove their claim for wasted expenditure.

[162] On this score, there is no dispute that the documents that were relied upon were Part C documents. They remained in that category right until the end of trial and until the decision on damages was delivered.

[163] The plaintiff had the burden of admitting those documents as exhibits by laying the factual foundation and by invoking the court's discretion under s. 32 of the Evidence Act 1950 or s. 73A of the Evidence Act 1950 as the case may be. No doubt, this would have been a laborious and tedious task. But there is no easy alternative.

[164] It appears that the plaintiff merely relied on Part C documents to prove its claim for wasted expenditure, which was an erroneous strategy. The burden on the part of a party who relies on Part C documents was lucidly explained by Wong Kian Kheong JC (as he then was) in *KTL Sdn Bhd & Anor v. Leong Oow Lai & Other Cases* [2014] 1 LNS 427; [2014] MLJU 1405; [2014] AMEJ 1458 HC where he said relevantly:

> 34. If a document is classified as a Part C Document, the party adducing that document bears the evidential burden to satisfy the court on a balance of probabilities the following 2 conditions of admissibility of that document (2 Conditions of Admissibility):
>
> (a) in accordance with the rule against documentary hearsay, the maker of the Part C Document has to be called as a witness – the Federal Court's judgment in *Capital Insurance Bhd v. Cheong Heng Loong Goldsmiths (KL) Sdn Bhd* [2005] 4 CLJ 1, at 20, 21-25 and 28. If the maker of a Part C Document cannot be called as a witness, the party adducing that document has to satisfy the court regarding the application of any one of the exceptions to the hearsay rule such as ss. 32(1)(a) to (h) [s. 32(i) and (J) EA only apply to criminal proceedings according to s. 32(2) EA], 33 to 37, 73A(1), (2) and/or 90A(1) EA [s. 90C EA provides that s. 90A EA shall prevail over, among others, any other provision of EA relating to the proof of evidence]; AND
>
> (b) "primary evidence" of the Part C Document as understood in s. 62 EA must be adduced in court as required by s. 64 EA – the Supreme Court's decision in *KPM Khidmat Sdn Bhd v. Tey Kim Suie* [1994] 3 CLJ 1; [1994] 2 MLJ 627, at 631. It is to be noted that Explanation 3 of s. 62 EA provides that a document produced by a computer (in compliance with s. 90A EA) is primary evidence.
>
> If "primary evidence " of a Part C Document is not available, s. 64 EA provides that "secondary evidence" [within the meaning of s. 63(a) to (e) EA] of the Part C Document can only be admitted as evidence if there is proof of the application of any one of the paragraphs in s. 65(1)(a) to (g) EA.
>
> 35. The 2 Conditions of Admissibility need not be fulfilled in respect of Part A Documents and Part B Documents.
>
> 36. As the 2 Conditions of Admissibility apply to a Part C Document, O. 34 rule 2(2)(i) RC allows any party to apply to court for directions during pre-trial case management to "ascertain " whether the opposing party still insists on the classification of that document as a Part C Document. Order 34 rule 2(2)(i) RC empowers the court to "make such order or give such direction as is necessary to achieve the just, expeditious

A and economical conduct of the trial". I am of the considered view that if a party still insists on categorising a document as a Part C Document, namely to put the opposing party to fulfil the 2 Conditions of Admissibility, that party is entitled to do so but the court may make a note of such a conduct by that party. Such a conduct may be subsequently taken into account by the court in deciding whether to award costs after
B trial and if so, how much – Order 59 r. 8(b) RC (conduct of all parties, including conduct before and during proceedings).

37. In view of O. 34 r. 2(2)(d), (e) and (i) RC, cases decided on agreed bundle of documents before the advent of RC such as the Supreme Court case of *Jaafar Shaari & Anor v. Tan Lip Eng & Anor* [1997] 4 CLJ 509; [1997]
C 4 AMR 3744 and the High Court's judgment in *Mohd Nazari bin Ab Majit v. Tan Keo Hock & Anor* [1999] 1 CLJ 601; [1998]4 AMR 3936, in my respectful opinion, should be read with caution.

[165] Clearly, the issue of classification of documents (Part C documents) could and should have been sorted out at the case management stage, if not
D before the liability stage, then at least before the assessment of damages stage. At any rate, what is clear is that the plaintiff relied on Part C documents at the assessment of damages and these were not proven as per the Evidence Act 1950 and admitted as exhibits.

[166] As regards the judge's reliance upon disputed documents, we think that
E it is appropriate to mention that in *UEM Group Bhd v. Genisys Integrated Engineers Pte Ltd & Anor* [2010] 9 CLJ 785; [2010] MLJU 2225; [2010] 2 MLRA 668 FC (at paras. 32-36) the Federal Court reversed the findings of the Court of Appeal which had relied upon "disputed" documents to make the impugned findings of fact.

F **[167]** In the result, we are impelled to the view that there was no evidence to support the claim for damages under the heading of "wasted expenditure" (prayer 35(2) of the SOC).

[168] No doubt, the plaintiff contends that it was open to the High Court to
G allow the sum of RM10.8 million under para. 35(7) of the SOC ie, the omnibus prayer. In our view, the omnibus prayer cannot be called in aid in the peculiar and specific circumstances of the case as the judge had unequivocally and specifically confined the plaintiff's claim for damages to para. 29 of the SOC, which was sought as a relief per para. 35(2) of the SOC – wasted expenditure. Indeed, the judge expressly disallowed para. 35(3) and
H (4) of the SOC and the plaintiff did not appeal or cross-appeal against that ruling.

[169] Hence, it was imperative for the plaintiff to confine themselves to the claim within the parameters of wasted expenditure. To allow the plaintiff to
I morph the claim into anything else would be akin to the proverbial "shifting of the goalpost". That cannot and should not be countenanced under any circumstances, regardless of the fairness or unfairness or inequities.

[170] In the result, for the reasons as discussed above, Appeal 685 is allowed and the order of the High Court dated 29 March 2019 (on damages) is set aside. As for costs, since the defendant lost one appeal and won in the other, there should be no order as to costs for both appeals.

The Outcome

[171] Appeal 2289 - Appeal 2289 is dismissed. The judgment/order of the High Court dated 19 October 2018 is affirmed.

[172] Appeal 685 - Appeal 685 is allowed. The judgment/order of the High Court dated 29 March 2019 is set aside.

[173] Costs – We make no order as to costs for both appeals.